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SHDKT PROCEEDINGS AND ORDERS DATE: [06/02/95]

CASE NBR: [94101450] CSX STATUS: [DECIDED]
SHORT TITLE: [Lawson, Michael, et al.]
VERSUS [Murray, Elrick, et ux.] DATE DOCKETED: [030195]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 1 1995	D	Petition for writ of certiorari filed.
2	Apr 3 1995		Brief of respondents Elrick Murray, et ux. in opposition filed.
3	Apr 5 1995		DISTRIBUTED. April 21, 1995 (Page 2)
4	Apr 24 1995		REDISTRIBUTED. April 28, 1995 (Page 12)
6	May 8 1995		REDISTRIBUTED. May 12, 1995 (Page 23)
7	May 8 1995		Letter from counsel for the petitioner received and distributed.
10	May 10 1995		Letter from respondent received and distributed.
9	May 15 1995		REDISTRIBUTED. May 19, 1995 (Page 13)
12	May 22 1995		REDISTRIBUTED. May 26, 1995 (Page 15)
13	May 30 1995		Petition DENIED. Opinion concurring in the denial of certiorari by Justice Scalia. (Detached opinion.)

****

In The

Supreme Court of the United States

October Term, 1994

MICHAEL LAWSON and DAVID CRIST,

Petitioners,

v.

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After finding that petitioners had not committed any crimes or torts, and that their picketing had been peaceful and lawful, the Supreme Court of New Jersey nevertheless issued a permanent injunction prohibiting petitioners from: picketing within 100 feet of the home of a physician who performs abortions; picketing in a group of more than 10 persons outside the 100-foot buffer zone; picketing more than one hour every two weeks; and picketing without giving 24 hours' advance notice to the police. The court below interpreted *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) as an "invitation" to impose such restrictions on picketing in residential neighborhoods, and held that state courts have "inherent authority" to restrain peaceful picketing in order to effectuate a state's "common-law public policy" in favor of residential privacy. The court below also found its injunction to be content-neutral, although it applies only to pro-life picketers. Accordingly, the questions presented are:

1. After *Madsen v. Women's Health Ctr., Inc.*, is a showing of actual or imminent violation of statutory or common law still a constitutional prerequisite to the issuance of an injunction imposing restrictions on picketing in a residential neighborhood?

2. Are all injunctions restricting picketing subject to the new intermediate standard of review which was announced in *Madsen v. Women's Health Ctr., Inc.*, or is peaceful and lawful picketing still protected by the strictest standards of review under the First and Fourteenth Amendments and the doctrine of prior restraints?

QUESTIONS PRESENTED – Continued

3. After *Madsen v. Women's Health Ctr., Inc.*, must all injunctions imposing restrictions on picketing by a group expressing a particular viewpoint be considered content-neutral, even if they are issued without a showing of actual or imminent violation of statutory or common law?

4. Does an injunction imposing a 100-foot "picket-free zone" surrounding the property of a physician who performs abortions burden more speech than is necessary to protect his residential privacy against peaceful and lawful picketing?

PARTIES

In addition to the parties listed in the caption of this petition, the following were listed as parties in the caption of the case in the court below: Jane Doe (a fictitious name) and John Doe (a fictitious name).

Neither of the petitioners in this case is a corporation. *See* Rule 29.1.

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No. _____

In The

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Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The most recent decision of the Supreme Court of New Jersey is reported at 138 N.J. 206, 649 A.2d 1253 (1994). (App. 1a) The earlier decision of the Supreme Court of New Jersey is reported at 136 N.J. 32, 642 A.2d 338 (1994), *vacated*, 115 S. Ct. 44 (1994). (App. 38a) The decision of the Appellate Division of the Superior Court of New Jersey is reported at 264 N.J. Super. 17, 624 A.2d 3 (1993). (App. 65a) The opinion and the permanent injunction of the Chancery Division of the Superior Court of New Jersey (App. 88a, 106a) are unreported. The opinion of the United States District Court for the District of New Jersey (App. 108a) is unreported. The order of the United States Court of Appeals for the Third Circuit (App. 123a) is unreported.

JURISDICTION

The opinion and judgment of the Supreme Court of New Jersey in this case was entered on December 1, 1994. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Like many of their fellow citizens, petitioners Michael Lawson and David Crist are strongly opposed to abortion, which they consider to be the killing of innocent human life. In order to translate their deeply held convictions into concrete action, petitioners regularly exercise their constitutional right to communicate their views to the public by means of peaceful demonstrations throughout New Jersey. Respondent Elrick Murray is a physician who performs abortions at various locations in the northern half of New Jersey. One of his abortion clinics is located in Howell, near the homes of

petitioners. Petitioners routinely participate in pro-life picketing outside of the Howell clinic.

In January 1991, petitioners decided to participate in a peaceful demonstration in the neighborhood of Dr. Murray's home in Westfield, New Jersey, about one hour's drive from Howell. The purpose of this demonstration was to protest abortion, to protest Dr. Murray's involvement in abortion, to raise public consciousness on the abortion issue, and to educate and persuade Dr. Murray, his neighbors and other members of the public passing by.

A day or two before the demonstration, petitioners informed the Westfield police about it. Although Westfield does not have any ordinances prohibiting or regulating picketing, the police met with petitioners and instructed them on basic guidelines for picketing, such as staying on the public sidewalks, avoiding trespassing, and remaining orderly and peaceful.

On Sunday, January 20, 1991, in compliance with the police instructions, and under observation by six or seven police officers, petitioners and approximately 55 other demonstrators walked single-file or two abreast up and down the public sidewalks on the suburban residential street where Dr. Murray lives.[1] The demonstrators carried signs with statements such as "Stop Abortion Now," "Abortion Kills Children," "Choose Life," "Stop Killing Babies" and "Legalized Abortion Is Legalized Murder!" Some of the signs displayed aborted babies, and others used Dr. Murray's name (for example, "Dr. Murray Please Stop Abortions," "Dr. Murray scars women and kills their unborn children" and "Elrick Murray Pre-Born Baby Exterminator and Nomad Abortionist").

The demonstrators did not mass or congregate in front of Dr. Murray's home, but rather walked throughout the entire neighborhood, following a route spanning about 10 houses. The demonstration, which lasted only one hour (from 3:00 to 4:00 P.M.), was orderly and peaceful. There was no violence, trespassing, loud noise, obstruction of traffic, or any other

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[1] The trial judge found that respondents live in "a very upper middle class residential . . . neighborhood" on a street approximately 600 yards long, 33 yards wide and lined with at least 15 single-family homes on each side.

disorderly conduct. No arrests were made or even requested; indeed, the police who observed the demonstration did not even bother to write a report about it. Far from being disturbed by the picketing, Dr. Murray (who was home alone) watched a football game on television, talked on the telephone with several neighbors, and even supervised the delivery of two babies over the telephone.

Nevertheless, Dr. Murray and his wife, respondent Belinda Murray, filed the present action in the Superior Court of New Jersey almost three weeks after the demonstration, accusing petitioners of "annoying, disturbing, disrupting, intimidating, molesting and otherwise intentionally interfering with respondents' privacy and quiet enjoyment of their property."[2] Respondents applied for and obtained a Temporary Restraining Order censoring petitioners' signs, prohibiting petitioners from distributing literature to respondents and their neighbors, and limiting demonstrations to once every three weeks, for one hour, with only two demonstrators at a time.[3]

Petitioners removed the case to the United States District Court and moved for dissolution of the Temporary Restraining Order. Because the district judge refused to grant or deny the motion, petitioners filed an interlocutory appeal and requested a stay of the Temporary Restraining Order pending appeal. The United States Court of Appeals for the Third Circuit denied the stay and remanded the case for a determination as to whether the Temporary Restraining Order had

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[2] When asked to specify the conduct of petitioners that gave rise to the allegations quoted in the text, Dr. Murray replied: "One, I think that they presented themselves in an overwhelming number. Two, I think that they carried placards that were blatantly ignorant in content. And three, they were consorting with my neighbors in a fashion that was curious." According to his testimony, "the neighbors learn[ed] for the first time that [I] perform abortions" and "learned for the first time that a physician who does an abortion is said to be a killer." Dr. Murray also admitted: "[T]he most annoying thing was that they were in front of my house. There are a number of doctors that practice abortion in their practice and why me."

[3] In his trial testimony, Dr. Murray candidly admitted the chilling effect of the Temporary Restraining Order: "I thought that the spirit of the injunction was to discourage them, because there'd be no sense in them coming with only two."

expired. (App. 123a) The district judge subsequently held that the Temporary Restraining Order had expired. On her own motion, the district judge dismissed respondents' federal claim and then remanded the remaining state claims to the Superior Court of New Jersey. (App. 108a) The state trial judge immediately re-imposed the Temporary Restraining Order.

After a full trial on the merits, the trial court found that petitioners had committed no crimes and that respondents had failed to establish any of the tort causes of action they had asserted. Nevertheless, the trial judge went on to reject petitioners' "position that no injunction can issue unless a crime or an expressed tort has been committed." Instead, the trial judge held that he has the "inherent authority" to balance the interests of the parties. Based solely on this "inherent equitable power," the trial judge entered a permanent injunction prohibiting petitioners from "picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence." (App. 88a, 106a)

The Appellate Division of the Superior Court of New Jersey upheld the "inherent power" of trial judges to enjoin First Amendment activities in the absence of any actual or threatened crime or tort. After finding that "an injunction is necessarily directed to a particular class of speakers," and that this injunction is a "300-foot restriction on expression of a particular viewpoint," the effect of which is "to disallow in this particular location, the vicinity of Dr. Murray's home, anti-abortion picketing only," the Appellate Division upheld the injunction as "a content-neutral time, place and manner restriction." (App. 65a)

The Supreme Court of New Jersey affirmed, agreeing that state courts have "inherent authority" to enjoin peaceful expressive activities in residential neighborhoods. After recognizing that the permanent injunction "restrain[s] the expressive activities only of anti-abortion picketers," the court found the injunction to be content-neutral. The court held that "a common-law public policy exists and that that policy implicates a significant government interest justifying the imposition of injunctive restrictions" on peaceful First

Amendment activities. The court concluded that the complete ban on pro-life demonstrations within 300 feet of respondents' home "meets the requirements for narrow tailoring of a 'place' restriction." (App. 38a)

This Court granted certiorari, vacated the judgment below, and remanded for further consideration in light of *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994). *See Lawson v. Murray*, 115 S. Ct. 44 (1994).

The Supreme Court of New Jersey interpreted the remand as an "invitation" to impose a "picket-free zone" smaller than 300 feet. Accordingly, the original injunction was replaced with the following:

> Defendants and all those in active concert or participation with them:
>
> (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the Murray residence, located at 917 Carlton Road, Westfield, New Jersey;
>
> (2) may picket in a group of no more than ten persons outside the 100-foot zone around the Murray residence for one hour every two weeks;
>
> (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing.

(App. 1a-37a)

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of New Jersey is in direct conflict with the decision of this Court in *Madsen v. Women's Health Center, Inc.*, and other applicable decisions of this Court. The decision below is also in direct conflict with the subsequent decision of the Sixth Circuit in *Vittitow v. City of Arlington*, 43 F.3d 1100 (1995), and clashes in several important respects with the decisions of other state appellate courts and federal courts.

The issues presented in this case are of considerable national significance. Across the nation, physicians and other

employees of abortion businesses have used suits for injunctive relief in an effort to restrain anti-abortion activities in residential neighborhoods. Some courts – like the court below – have disregarded or distorted constitutional principles in their result-oriented justifications for enjoining peaceful picketing. Far from halting this disturbing trend, *Madsen* has increased the doctrinal confusion, as is evidenced by the directly conflicting interpretations given to *Madsen* by the New Jersey Supreme Court and the Sixth Circuit. Unless this Court intervenes to re-affirm that actual or imminent misconduct is a constitutional prerequisite for injunctions against picketing, and to clarify the correct standard of review for injunctions restricting peaceful and lawful picketing in residential neighborhoods, the lower courts will continue their unjustified nullification of the First Amendment right to express oneself in a residential public forum.

Petitioners respectfully come before this Court seeking vindication of fundamental rights guaranteed by the Constitution. Petitioners are here not only on their own behalf, but also on behalf of countless citizens whose constitutional rights to freedom of speech and freedom of assembly will be chilled or choked if the lower courts retain a blank warrant to clear residential streets merely because one of the residents may be upset by the message. This case presents an important opportunity for this Court to reaffirm that the First Amendment is not an idle platitude that may be jettisoned whenever it clashes with someone's personal preference for the sounds of silence in the streets.

This Court should grant the present petition for a writ of certiorari and put a halt to the steady erosion of First Amendment doctrine that is being used to justify the suppression of free speech activities in residential neighborhoods.

I. THE DECISION OF THE NEW JERSEY SUPREME COURT DIRECTLY CONFLICTS WITH A DECISION OF THE SIXTH CIRCUIT.

The original decision of the New Jersey Supreme Court upheld an injunction prohibiting picketing within 300 feet of the residence of a physician who performs abortions. (App.

38a) After this Court remanded for further consideration in light of *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994), the New Jersey Supreme Court decided to accept what it perceived as "the United States Supreme Court's invitation in *Madsen* to impose 'a limitation on the time, duration of picketing, and number of pickets outside a *smaller* zone.' " (App. 33a) Consequently, the court below reduced the "picket-free zone" from 300 feet to 100 feet, observing that "[a] buffer of 100 feet is required here because it places the border of the zone approximately one-and-one-half lots away from the [physician's] residence." (App. 35a)

One month later, the United States Court of Appeals for the Sixth Circuit reversed an almost identical injunction that prohibited picketing in front of a physician's home and the two homes on either side of the physician's home. *Vittitow v. City of Arlington*, 43 F.3d 1100 (6th Cir. 1995). In sharp contrast with the New Jersey Supreme Court's reading of *Madsen*, the Sixth Circuit concluded that *Madsen* "makes it clear that any linear extension beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." *Id.* at 1105.

The decisions of the New Jersey Supreme Court and the Sixth Circuit are flatly contradictory. Therefore, this Court should grant review to settle this glaring conflict.

II. THE DECISION OF THE NEW JERSEY SUPREME COURT DIRECTLY CONFLICTS WITH SETTLED CONSTITUTIONAL DOCTRINE REQUIRING ACTUAL OR IMMINENT MISCONDUCT BEFORE PICKETING CAN BE ENJOINED.

"There can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods . . . [constitutes] expressive conduct that falls within the First Amendment's preserve." *Carey v. Brown*, 447 U.S. 455, 460 (1980). Indeed, this Court has specifically ruled on two separate occasions that peaceful pro-life picketing in the residential neighborhood of a physician who performs abortions is an activity that lies "at the core of the First Amendment." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *see*

Madsen, 114 S. Ct. at 2530. Because peaceful picketing in a residential neighborhood is a constitutionally-protected activity, the state courts simply cannot treat such picketing as if it were wrongful in itself. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In other words, the mere exercise of the right to engage in peaceful picketing is not a valid basis for the issuance of an injunction suppressing future picketing.

Nevertheless, the court below held directly to the contrary. Without even mentioning the Supremacy Clause, the court below held that New Jersey's "common-law public policy" in favor of residential privacy overrides the First Amendment right to engage in peaceful picketing and authorizes state courts to impose restrictions – including "picket-free zones" – on peaceful picketing in residential neighborhoods.[4]

The decision below explicitly admits that the injunction in this case was "not imposed to remedy unlawful conduct." (App. 21a)

> [Petitioners] and ACLU argue that no distance limitation, no matter how small, is permissible, because no conduct-based factors are present (*e.g.*, prior violation of a judicial order, or unlawful or disorderly conduct) to warrant such relief. That view is inconsistent with our reading of *Madsen* that a smaller picket-free zone is permissible, even in the absence of such factors.

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[4] It is important to note that all causes of action alleged in the Complaint – including invasion of privacy – were resolved in favor of petitioners. (App. 92a-97a) The "common-law public policy" theory was contrived by the New Jersey Supreme Court after-the-fact in order to justify the issuance of an injunction in the absence of criminal or tortious conduct. It defies logic to hold that equitable relief can be based on "common-law public policy" when the same relief has already been denied under the common-law torts from which the "public policy" was derived. Of course, the courts below are free to interpret New Jersey's common law and public policy any way they choose, however illogical. Nevertheless, the Supremacy Clause forbids them from using their peculiar interpretation of state law to nullify rights secured by the First and Fourteenth Amendments, including the right to picket peacefully on residential streets.

(App. 34a) Having held that residential picketing can be restrained without any conduct-based justification, the court below perceived the task of a reviewing court as being limited to judging the reasonableness of the restraints under the new intermediate standard which was announced in *Madsen*, 114 S. Ct. at 2524-25. Thus, in the view of the New Jersey Supreme Court, liability (*i.e.*, wrongful conduct on the part of the picketers) is no longer an issue in residential picketing cases (App. 47a); the only issue is the reasonableness of the remedy.

This view, which flies in the face of long-settled constitutional doctrine, is the unfortunate but predictable result of a lack of rigor in the *Madsen* opinion. Indeed, even before the decision below was issued, commentators had already pointed out the weakness in *Madsen* that the New Jersey Supreme Court was able to exploit:

> The [*Madsen*] Court should have explicitly required, as a matter of constitutional principle, that injunctions targeting expressive activity be based on a finding of an actual or imminent violation of law closely related to the interests served by the injunction. The Court acknowledged in a footnote that "[u]nder general *equity* principles," findings of a past or imminent violation of law and a danger of recurrence are required, but nowhere in its opinion did the Court make clear that a close connection between the enjoined speech and a violation of law should be a *constitutional* prerequisite to the issuance of an injunction against speech.

The Supreme Court, 1993 Term – Leading Cases, 108 Harv. L. Rev. 139, 278 (1994) (emphasis in original; footnotes omitted). This Court should take advantage of the opportunity presented by this case to clarify First Amendment doctrine by closing the loophole in *Madsen* which has already been used to justify the suppression of protected speech.

III. THE DECISION OF THE NEW JERSEY SUPREME COURT DIRECTLY CONFLICTS WITH THE DOCTRINE OF PRIOR RESTRAINTS.

One of the most well-settled and unequivocal of all constitutional doctrines is the bedrock principle that prior restraints against expressive activities are prohibited by the First Amendment. "The elimination of prior restraints was a leading purpose in the adoption of the First Amendment." *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 n.5 (1968) (internal quotation marks & citation omitted).

"The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (internal quotation marks, emphasis & citation omitted). The speaker who proceeds in the face of a prior restraint faces punishment simply for violating the dictates of the restraint, regardless of whether the expressive activity would have been otherwise lawful. Subsequent punishment schemes, by contrast, impose sanctions only *after* specific tortious or criminal conduct has occurred. The "time-honored distinction between barring speech in the future and penalizing past speech . . . is critical to our First Amendment jurisprudence." *Id.* at 2773.

This Court has made it absolutely clear that "prior restraints upon speech . . . are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

> Any system of prior restraint . . . "comes to this Court bearing a heavy presumption against its constitutional validity." The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say,

> and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) (citations omitted; emphasis in original).

Not surprisingly, *Madsen* did not abolish or vitiate the doctrine of prior restraints. Instead, *Madsen* merely clarified that the doctrine is inapplicable where "the injunction was issued not because of the content of petitioners' expression, . . . but because of their prior unlawful conduct." 114 S. Ct. at 2524 n.2. In other words, an injunction issued without reference to "prior unlawful conduct" is still a prior restraint and therefore presumptively unconstitutional, while an injunction issued to remedy "prior unlawful conduct" is subject to the new (lower) standard of review articulated in *Madsen*. In determining which standard of review applies, the crucial distinction is whether or not the challenged injunction was based on a finding of "prior unlawful conduct."[5]

The decision of the Supreme Court of New Jersey strikes at the heart of the doctrine of prior restraints. The courts below recognized that petitioners had not engaged in any criminal or tortious conduct. Consequently, the challenged injunction was issued in advance of any conduct for which punishment may be appropriate. Nevertheless, instead of reviewing the injunction as a prior restraint, the Supreme Court of New Jersey applied the more deferential standard articulated in *Madsen*. This represents a fundamental jurisprudential error.

Unlike the injunction in *Madsen*, the injunction in the present case was not predicated upon a finding of any wrongful conduct on the part of petitioners.[6] Therefore, the injunction at issue here is governed by the doctrine of prior

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[5] This is the same distinction that Justice Stevens recognized in *Hirsh v. City of Atlanta*, 495 U.S. 927 (1990), where he stated that an injunction against a march by persons who did not have a history of illegal conduct "constitutes a naked prior restraint."

[6] In sharp contrast with the present case, the trial court in *Madsen* "found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction." 114 S. Ct. at 2532 (opinion of Stevens, J., concurring & dissenting).

restraints rather than the new standard articulated in *Madsen*. Under the doctrine of prior restraints, the injunction at issue is presumptively unconstitutional and should be reviewed as such. The result of such review must be reversal of the injunction, because New Jersey's "common-law public policy" in favor of residential privacy cannot overcome the presumption of unconstitutionality.

> The Supreme Court has spoken of constitutionally permissible prior restraints as "exceptional cases." This impression has been reinforced by the Court's decisions refusing to perceive threats to . . . a homeowner's privacy as sufficiently exceptional to justify prior restraints.

Laurence H. Tribe, *American Constitutional Law* § 12-36, at 1045-46 (2d ed. 1988) (footnotes omitted). *See also id.* at 1051 n.32 ("the degree of intrusion into the home itself [is] a factual question which cannot confidently be resolved in advance of the expressive acts sought to be enjoined").

Contrary to the suggestion of the court below, an injunction need not restrict the content of the enjoined expression in order to qualify as a prior restraint. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court struck down an injunction that forbade "passing out pamphlets, leaflets or literature *of any kind*, and from picketing," calling the injunction a "prior restraint." *Id.* at 417, 419 (emphasis added). In *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968), this Court reviewed an injunction that forbade "holding rallies or meetings . . . which will tend to disturb and endanger the citizens of the County and . . . from using . . . any . . . sound making or producing device thereby disturbing the tranquility of the populace of the County." *Id.* at 177 n.3. Again, the Court analyzed the injunction as a prior restraint. *Id.* at 181. Indeed, the seminal prior restraint case of *Near v. Minnesota*, 283 U.S. 697 (1931) invalidated a court order which forbade *all* future publication of a newspaper.

Nor can the doctrine of prior restraints be circumvented by dismissing the restrictions at issue here as "only indirect or minor effects on speech." (App. 19a) A 100-foot "picket-free zone" is not an incidental burden on speech; far smaller "bubble zones" have been held unconstitutional. *See, e.g., Madsen*, 114 S. Ct. at 2528; *Pro-Choice Network v. Schenck*, 34 F.3d 130 (2d Cir. 1994), *reh'g en banc granted*, ___ F.3d ___ (2d Cir. 1994); *see also Vittitow v. City of Arlington*, 43 F.3d 1100 (6th Cir. 1995). "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981), *quoting Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The requirement that petitioners notify the police 24 hours in advance of picketing is also unconstitutional. *See Thomas v. Collins*, 323 U.S. 516, 540 (1945) ("We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment"); *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976) (invalidating an ordinance requiring canvassers to "notify the Police Department, in writing, for identification only"). Similarly, arbitrary limitations on the number of picketers have repeatedly been condemned as violative of the First Amendment.[7] *See, e.g., Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 558-61 (5th Cir. 1988); *Davis v. Francois*, 395 F.2d 730, 735 (5th Cir. 1968); *Davis v. Village of Newburgh Heights*, 642 F. Supp. 413, 415 (N.D. Ohio 1986). Thus, the restrictions imposed by the New Jersey Supreme Court are clearly significant enough to trigger the doctrine of prior restraints.

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[7] "When protest takes the form of . . . picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern." *Walker v. City of Birmingham*, 388 U.S. 307, 316 (1967). The courts below found that petitioners' conduct did not implicate these limited state interests, and that the public sidewalks in respondents' neighborhood easily accommodated 60 picketers. Therefore, limiting the number of picketers to a total of 10 persons is completely unjustified.

The need to affirm the applicability of the prior restraint doctrine to injunctions against picketing is particularly important today. Over the last several years, lower courts have tended with increasing frequency to disregard, distort or reject this Court's teachings on this question.[8] The decision below is the latest and most egregious example of this disturbing trend. This Court should intervene and put a decisive halt to this trend by clarifying that prior restraints issued by judges are no more tolerable than prior restraints issued by the executive and legislative branches of government.

Although *Madsen* recognizes that prior restraints "do often take the form of injunctions," 114 S. Ct. at 2524 n.2, it fails to delineate when an injunction constitutes a prior restraint. As a result of "never outlining a precise test" (App. 17a), *Madsen* leaves the lower courts without reliable guidance, thereby giving them room to maneuver and thus placing First Amendment rights at greater risk of deliberate or inadvertent infringement. This Court should take advantage of the opportunity presented by this case to clarify that injunctions issued without conduct-based justification are prior restraints and therefore presumptively unconstitutional.

IV. THE DECISION OF THE NEW JERSEY SUPREME COURT DIRECTLY CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

The decision of the Supreme Court of New Jersey in this case directly conflicts in many important respects with the applicable decisions of this Court and the decisions of other state and federal courts.

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[8] Curiously, these cases always seem to arise in the context of anti-abortion demonstrations, raising the question whether a result-oriented mentality might not be at work.

A. Restrictions Applicable Only to Pro-Life Picketers Are Content-Based.

In *Madsen*, this Court announced a new standard of review applicable to injunctions that restrict First Amendment activities. However, *Madsen* made it clear that the new standard is applicable only "when evaluating a content-neutral injunction." 114 S. Ct. at 2525. As recognized in *Madsen*, injunctions that are content-based remain subject to a much higher standard of review – the "heightened scrutiny set forth in *Perry Education Assn.*, 460 US, at 45."[9] 114 S. Ct. at 2524. Thus, the crucial threshold issue that determines which standard of review to apply is whether or not the challenged injunction is content-based.

The demonstrators in *Madsen* argued that the Florida injunction was content-based because it applied only to anti-abortion protestors. In rejecting this argument, this Court relied on the fact that the demonstrators had been guilty of "prior unlawful conduct."

> Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." . . . We thus look to the government's purpose as the threshold consideration. Here, the state court imposed restrictions on petitioners incidental to their antiabortion message *because they repeatedly violated the court's original order.*

114 S. Ct. at 2523-24 (citations omitted; emphasis added).

On the threshold issue of content-neutrality, the present case is easily distinguished from *Madsen*. Unlike the unruly demonstrators in *Madsen*, who "not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction," *id.* at 2532 (opinion of Stevens, J.), the petitioners in the present case were peaceful and orderly and did not commit any crimes or torts. Consequently, the *Madsen*

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[9] Under *Perry*'s "heightened scrutiny," a content-based restriction must be "necessary to serve a compelling state interest" and must be "narrowly drawn to achieve that end." 460 U.S. at 45.

conclusion of content-neutrality simply does not apply here. Because petitioners were not guilty of wrongful conduct, the injunction against their First Amendment activities must be analyzed under other precedents on the issue of content-neutrality.

Under these precedents, many of which are cited in *Madsen*, *id.* at 2523, a restriction is content-neutral only if it can be justified without reference to the content of the regulated speech. In applying this test, the court below committed serious constitutional error by concluding that the challenged injunction is content-neutral. As recognized by the Appellate Division of the Superior Court of New Jersey, "an injunction is necessarily directed to a particular class of speakers," and the injunction at issue here is a "restriction on expression of a particular viewpoint." (App. 82a, 84a) More importantly, the Appellate Division conceded that the effect of the injunction is to "disallow in this particular location, the vicinity of Dr. Murray's home, anti-abortion picketing only, but that is the effect of [petitioners'] viewpoint." (App. 84a) The Supreme Court of New Jersey agreed that the injunction "restrain[s] the expressive activities only of anti-abortion picketers." (App. 51a)

Given these findings by the courts below, it is impossible to fathom, much less to justify, their conclusion that the challenged injunction is content-neutral. Only one viewpoint is banned from respondents' neighborhood, and only one particular group of picketers is banned from respondents' neighborhood. Such discrimination violates not only the First Amendment but also the equal protection clause of the Fourteenth Amendment. *See Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

Discriminatory restrictions on picketing do not avoid constitutional condemnation merely because they are embodied in an injunction rather than a statute. *Madsen* teaches that discriminatory injunctions can pass constitutional muster, but only if they are issued in order to remedy "prior unlawful conduct." The New Jersey Supreme Court expressly rejected this teaching:

> [Petitioners and ACLU assert that] *Madsen* requires this Court to find that if an injunction affecting speech is not issued to remedy a past or threatened violation of the law, no basis other than the content of the speech exists to justify the regulation. That is not at all the case.

(App. 21a) Nevertheless, where (as here) an injunction is issued without reference to "prior unlawful conduct," it is indistinguishable from any other attempt by an organ of state government to use the coercive power of the state to discriminate among speakers. If a legislature cannot discriminate among viewpoints when it implements a state's public policy in favor of residential privacy, certainly a state court cannot discriminate among viewpoints when the sole basis for its action is the rationale that it is implementing the same public policy.[10]

The courts below attempted to rationalize their conclusion by arguing that the injunction does not mention the content of petitioners' message but "merely forbid[s] them from picketing within a certain distance of [respondents'] residence," in order to prevent "the intimidating effect of the bodily presence of picketers on the residents of the home." (App. 51a, 85a) However, this rationale proves too much, because *every* advocacy group has an "intimidating effect" on its opponents (and even neutral citizens) when it marches through their neighborhood. Thus, the rationale of the courts below would foreclose *all* advocacy in any neighborhood where even a single opponent (or neutral citizen) claimed to feel "intimidated." Furthermore, picketing cannot be accomplished without "bodily presence," so as a practical matter the rationale of the courts below would proscribe a form of

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[10] *Madsen's* repeated emphasis on the fact that the protestors had been guilty of "prior unlawful conduct" erects a constitutional distinction between courts acting in their normal judicial capacity to remedy "prior unlawful conduct" and courts acting as self-appointed mini-legislatures to implement their own notions of public policy without regard to "prior unlawful conduct." The opinions below make it clear that this case falls into the latter category. (*See, e.g.*, App. 21a, 47a-48a, 53a, 56a)

expression that is clearly permissible in residential neighborhoods.[11]

More importantly, it is well-settled that restrictions on picketing cannot be justified solely by reference to the impact of the picketers' activities on their audience. Such a justification renders the restrictions content-based. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992); *see United States v. Eichman*, 496 U.S. 310, 317-19 (1990).

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court invalidated a 500-foot restriction on displaying signs near foreign embassies, even though the restriction was neutral on its face. In doing so, this Court clearly held that arguments based on psychological damage (such as an "intimidating effect") supposedly resulting from picketing necessarily implicate the content of the message.

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton [v. Playtime Theatres, Inc., 475 U.S. 41 (1986)]. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the

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[11] After arguing that the injunction is content-neutral because it merely protects respondents from being intimidated by petitioners' "sheer physical presence" (App. 51a), the court below observed that the injunction does not prevent petitioners from leafletting and door-to-door canvassing within the 100-foot "picket-free zone." (App. 20a) However, leafletting and door-to-door canvassing require "sheer physical presence." If "sheer physical presence" is permitted under the injunction, then obviously it is impossible to justify the injunction on the ground that it is necessary to prevent "sheer physical presence." An injunction which is designed to prevent "sheer physical presence" but at the same time permits such "sheer physical presence" is self-defeating, irrational and impermissibly underinclusive. *See City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2043-46 (1994).

> direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.
>
> * * *
>
> [Respondents] rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments. This justification focuses *only* on the content of the speech and the direct impact that speech has on its listeners. The emotive impact of speech on its audience is not a "secondary effect." Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.

Id. at 321 (emphasis in original).

This point was re-affirmed in *Madsen*, when this Court invalidated the "images observable" portion of the Florida injunction: "The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." 114 S. Ct. at 2529.

In *Boos v. Barry* and *Madsen*, this Court was merely articulating the obvious: the audience is claiming psychological damage in response to a particular message, not in response to all messages. Consequently, the reaction of the audience is necessarily content-based. In the present case, respondents do not care about any type of picketing other than anti-abortion picketing. They did not and cannot claim that they feel "intimidated" by any other type of picketing. Therefore, in focusing on the "intimidating effect" of petitioners' picketing on respondents, the courts below justified the injunction by reference to the content of petitioners' message, despite their protestations to the contrary.[12] As a result, the injunction is plainly content-based.

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[12] Even more outrageous is the reliance of the court below on "unpleasant incidents" which were "never connected" to petitioners but nevertheless supposedly caused respondents to feel "threatened" by petitioners' peaceful picketing. (App. 6a, 31a) It is grossly unconstitutional to punish petitioners for the alleged conduct of the unknown perpetrators of these incidents. This Court has repeatedly rejected this type of "guilt by association" as a valid basis for restricting speech. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Healy v. James*, 408 U.S. 169 (1972). Significantly, the protestors in *Madsen* were allowed to picket in residential neighborhoods even though *the very same protestors* had been found guilty of wrongful conduct elsewhere (at the abortion clinic), including the creation of "a threat of violence and intimidation." *See Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 671 (Fla. 1993), *rev'd sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. at 2529-30. Unlike the unruly demonstrators in *Madsen*, the picketers in the present case were found to have been peaceful and orderly at all times. The record is devoid of any objective basis for respondents' purported feeling of "intimidation." Accordingly, the sole factual basis for the injunction boils down to nothing more than the subjective reaction respondents claimed to experience upon seeing these particular picketers, which is a content-based justification.

Because the injunction is content-based, the Supreme Court of New Jersey erred in reviewing and upholding the injunction under the lower standard applicable to content-neutral restrictions on speech. The injunction cannot withstand scrutiny under the higher standard applicable to content-based restrictions. Like prior restraints, content-based restrictions are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542-43 (1992). Only a compelling state interest can justify a content-based restriction. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Residential privacy is not a sufficiently compelling interest to justify content-based restrictions on picketing, *Carey v. Brown*, 447 U.S. 455, 465 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), as New Jersey's Appellate Division recognized in this case. (App. 82a) Nevertheless, residential privacy was the only interest proffered by the courts below to support the injunction's "total ban on picketing." Accordingly, the courts below failed to identify a state interest sufficient to overcome the presumptive unconstitutionality of the injunction.

As noted by the New Jersey Supreme Court, its decision is the latest in a growing trend of state court opinions holding that "injunctions against anti-abortion protestors outside

doctors' residences . . . are content neutral."[13] (App. 52a) Thus, the issues presented in this case are of considerable national importance. Consequently, this Court should grant the petition for a writ of certiorari and clarify that an injunction banning peaceful residential picketing by a particular group of speakers is content-based and therefore unconstitutional.

B. The "Standard" Adopted by the Courts Below Fails to Meet the Standards Established by the Decisions of This Court.

When a state gives one of its officials the power to deny use of a traditional public forum in advance of actual expression, it must constrain the discretion of the official with "narrow, objective, and definite standards." *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-03 (1992), *quoting Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). As explained in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975):

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship – reflecting the natural distaste of a free people – is deep-written in our law.

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[13] *See* note 8 *supra*. In *Madsen*, one of the factors leading to the conclusion of content-neutrality was the following: "There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion." 114 S. Ct. at 2523. The same is not true of New Jersey law. When a New Jersey judge was recently asked to impose a 100-foot "picket-free zone" around the homes of church members to protect them from a picketer who called their church a cult, he ruled that the picketer "won't be held to the same standards as anti-abortion protestors who picket a Westfield physician's home." Anna Farneski, *City Woman May Picket Church She Says Is Cult*, Courier-News, Jan. 11, 1995, at B-1.

According to one of the opinions below, a state judge may ban peaceful picketing in a residential neighborhood upon a finding that such picketing has an "intimidating effect" on one of the residents. (App. 85a) However, a feeling of "intimidation" on the part of a homeowner is an "inherently subjective" standard, and this Court has repeatedly rejected such standards. *E.g., Boos v. Barry*, 485 U.S. 312, 322 (1988). The "intimidating effect" standard provides courts with unfettered discretion to proscribe expressive activities that annoy or offend a homeowner – or a judge. Because the "intimidating effect" standard "is susceptible of regular application to protected expression," it cannot survive scrutiny for vagueness and overbreadth. *E.g., City of Houston v. Hill*, 482 U.S. 451, 465-67 (1987). Thus, the absence of precise, objective and definite standards for denying the use of a residential public forum is another fatal flaw in the decisions below.[14]

The Supreme Court of New Jersey asserts that its system of banning speech in residential neighborhoods passes constitutional muster because the decision-maker is a judge, whose discretion is "constrained by well-recognized principles of law." (App. 52a) However, the mere fact that the decision-maker is a judge does not cure the fundamental defect in New Jersey's system of banning residential picketing. Judicial censorship is entitled to no more deference than legislative or executive censorship. *See Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). Dressing up the description of the

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[14] The "intimidating effect" standard appears only in the opinion of New Jersey's Appellate Division. (App. 85a) The New Jersey Supreme Court employs an even vaguer "standard" – peaceful picketing can be enjoined if it "impermissibly interfere[s] with . . . residential privacy." (App. 51a) The court apparently forgot that "interference" had been alleged in the Complaint and explicitly rejected by the trial court. (App. 94a-97a) However, the new "standard" does not require a showing of actual "interference," because the court below believes that residential picketing "inherently and offensively interfere[s] with . . . residential privacy." (App. 21a) Under this view, the mere exercise of the constitutional right to engage in peaceful residential picketing is sufficient, in and of itself, to constitute "interference." However, the First Amendment forbids state courts from defining constitutionally-protected means of expression as wrongful conduct. *See Organization for a Better Austin v. Keefe*, 402 U.S. at 419-20.

decision-making procedure in highfalutin terms such as "balancing" (App. 48a-49a) does not mean that the discretion of the judge is bounded by narrow, objective and definite standards, as required by the Constitution. The role of a New Jersey judge is indistinguishable from schemes involving "appraisal of facts, the exercise of judgment, and the formation of an opinion," which schemes have been repeatedly condemned by this Court. *E.g.*, *Forsyth County v. Nationalist Movement*, 112 S. Ct. at 2401; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 554.

Furthermore, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court invalidated an injunction against residential expressive activities despite findings by state trial and appellate courts that the activities were "coercive and intimidating" and invaded the plaintiff's privacy. Similarly, in *Madsen* this Court invalidated an injunction against residential protests, even though the state trial and appellate courts had found that the protestors had "[c]reated a threat of violence and intimidation" and had invaded the residents' privacy. *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d at 671, 678, *rev'd sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. at 2529-30. The fact that the state courts in *Keefe* and *Madsen* were "constrained by well-recognized principles of law" did not insulate their decision from constitutional condemnation. The same result should obtain here.

Finally, in setting a "standard" that focuses solely on the "intimidating effect" of speech on its listeners, the courts below effectively nullified the decisions of this Court affording constitutional protection to advocacy designed to "intimidate" the audience. For example, in *Organization for a Better Austin v. Keefe*, this Court held: "The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment." *Id.* at 419. Similarly, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982), this Court stated: "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." Under the standard established by the decisions below, "coercive" speech loses its

constitutional protection if it succeeds in producing a feeling of "intimidation." The First Amendment will not tolerate a standard that permits only the most insipid and ineffective speech.

In short, the "intimidating effect" standard adopted by the courts below flies squarely in the face of numerous decisions of this Court. Accordingly, this Court should grant the present petition for a writ of certiorari and condemn the rógue notion that lower courts can use such a sweeping and subjective standard to ban peaceful picketing in residential neighborhoods.

C. Courts Cannot Create "Picket-Free Zones" in Residential Neighborhoods.

The decision below created a 100-foot "picket-free zone" surrounding the residence of respondents. This decision conflicts with the precedents of this Court and other appellate courts governing peaceful picketing in residential neighborhoods.

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court confronted a facial challenge to a municipal ordinance that seemed to ban residential picketing. After holding that residential picketing is protected by the First Amendment, the Court construed the ordinance narrowly in order to avoid constitutional difficulties. As a result, the scope of the ordinance was limited to a ban on single-residence picketing. In reaching this result, the Court carefully distinguished between "focused picketing taking place solely in front of a particular residence" and "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Id.* at 483. The Court also noted: "Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching." *Id.* at 484. Significantly, the Court stated: "The type of focused picketing prohibited by the . . . ordinance is fundamentally different from more generally directed means of communication *that may not be completely banned in residential areas.*" *Id.* at 486 (emphasis added).

The state supreme courts of Rhode Island and Kansas followed the teaching of *Frisby*. In order to avoid constitutional difficulties, these courts construed ordinances forbidding residential picketing to ban only picketing confined to the front of a single residence.[15] *See Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990); *City of Prairie Village v. Hogan*, 253 Kan. 423, 855 P.2d 949 (1993). The Supreme Court of Texas, likewise heeding *Frisby*'s holding that residential picketing is core First Amendment activity, overturned an injunction against picketing within 400 feet of an abortionist's residence. *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993). The court held that in the absence of either an ordinance or some specific tortious conduct, the injunction was improper; residential picketing, even focused, single-residence picketing, is not *per se* unlawful. *Id.* at 513-14.

In *Madsen v. Women's Health Ctr., Inc.*, this Court invalidated a Florida injunction which banned demonstrations within 300 feet of the homes of physicians and other employees of an abortion clinic.

> [T]he 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. The ordinance at issue there made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual." The prohibition was limited to "focused picketing taking place solely in front of a particular residence." By contrast, the 300-foot zone would ban "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a

[15] *See also Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990) (interpreting *Frisby* "as allowing protestors to express their message by marching through the streets of a neighborhood so long as they did not stop and direct their picketing at a particular residence").

> smaller zone could have accomplished the desired result.
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> * * *
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> We strike down as unconstitutional . . . the 300-foot buffer zone around the residences, because th[is] provision[ ] sweep[s] more broadly than necessary to accomplish the permissible goals of the injunction.

Id. at 2529-30 (citations omitted). All nine Justices joined in this result.

According to the Sixth Circuit, *Madsen* "makes it clear that any linear extension beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." *Vittitow v. City of Arlington*, 43 F.3d at 1105.

Nevertheless, without any conduct-based justification,[16] the court below prohibited peaceful picketing within 100 feet of respondents' home. This "picket-free zone" runs counter to the precedents discussed above in at least two significant respects. First, by pushing picketers 100 feet away from a given residence, the injunction goes far beyond a ban on single-residence picketing. Second, by creating an absolute "no-entry" zone, the injunction bans not only the *lingering* presence at issue in *Frisby* but also the *transient* presence characteristic of "walking a route in front of an entire block of houses."

In the present case, petitioners did precisely what *Frisby* said they could do – picket in front of an entire block of houses.[17] It is plain error to prohibit them from doing so. The

[16] While conceding that the picketing was peaceful and lawful, the court below suggested that respondents were "under siege." (App. 26a) However, the duration of the picketing never exceeded one hour, and the frequency of the sporadic picketing was never less than once every three weeks. The record reflects only three one-hour demonstrations and one 15-minute demonstration over a six-month period. This hardly qualifies as a "siege."

[17] The New Jersey Supreme Court conceded that the picketing in this case "spanned a length of approximately ten houses." Nevertheless, the court suggested that this was the equivalent of targeted picketing in front of a single residence, because there were always some picketers moving past respondents' home. (App.

opinion below rips out of context this Court's remarks about protection of residential privacy, ignoring the limitation of those remarks to targeted picketing and also ignoring the contrary remarks requiring that the neighborhood as a whole be open to picketing. The 100-foot "picket-free zone" embodied in the injunction here clearly cannot pass muster under *Frisby* and *Madsen*. Respondents' privacy interests are limited to the borders of their own property and do not extend to the public streets and sidewalks of the surrounding neighborhood. Thus, respondents' limited privacy interests are not a valid excuse for restricting their neighbors' access to the marketplace of ideas. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) ("respondent is not attempting to stop the flow of information into his own household, but to the public"). Respondents' remedy is to "pull [their] curtains," not to prohibit all peaceful pro-life picketing observable from their home. *See Madsen*, 114 S. Ct. at 2529.

The fatal flaw in the opinion below is its exaltation of a homeowner's right to privacy to the point where picketers must bear the burden of advancing a compelling reason for their presence in a residential neighborhood. This approach is a direct inversion of the presumptions established in the decisions of this Court. These decisions stand for the fundamental proposition that a public street in a residential neighborhood is a traditional public forum for the exercise of First Amendment rights. Thus, the starting point of any analysis must be the fact that petitioners have the right to picket in respondents' residential neighborhood. This right of residential picketing cannot be extinguished or restricted unless it is

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26a, 60a) This equation of single-residence picketing with general neighborhood picketing is transparently result-oriented. The New Jersey Supreme Court's expansion of the "targeting" concept conveniently nullifies the distinction in *Frisby* and *Madsen* between single-residence picketing and "walking a route in front of an entire block of houses." By definition, walking a route in front of an entire block of houses requires passing the houses more than once. Furthermore, as the Sixth Circuit recently observed: "All picketing of this nature will have a target, otherwise it is not really picketing." 43 F.3d at 1107. Nevertheless, in New Jersey, one can no longer circle a block repeatedly, as did the protestors in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), without being accused of "targeting" one of the residents – which, of course, was precisely the motive of the protestors in *Gregory* and the leafletters in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

abused by criminal or tortious conduct on the part of petitioners.

It is difficult to imagine *any* residential picketing that would survive the free-wheeling and purely subjective "balancing" test adopted by the court below. This test completely ignores the strong presumption in favor of residential picketing and accords greater weight to the limited interest in privacy, wielding it as a sword to clear the streets instead of a shield against particularized abuses. In effect, the New Jersey Supreme Court has placed a judicial thumb on the scale in order to rig the results of the "balancing" test in favor of privacy, because it apparently disagrees with the greater weight the Constitution accords to free speech in residential areas (or, worse still, because it disagrees with petitioners' message).

This is why the starting point of analysis – the presumptive constitutionality of peaceful residential picketing – is so important in this case. Once one accepts this starting point, it follows that the mere act of peaceful residential picketing cannot be deemed wrongful, no matter how much it may upset respondents. Those who wish to restrict petitioners' right of residential picketing must bear the heavy burden of showing that petitioners abused the right by engaging in wrongful conduct above and beyond the mere act of picketing. No such showing was made in this case. It is undisputed, and it was found as a fact, that petitioners were peaceful and orderly at all times. Consequently, there is no factual or legal basis for restricting petitioners' right to picket in respondents' neighborhood.

In short, this case cries out for this Court to exercise its jurisdiction and to issue a significant decision on this constitutional issue of major national importance, in order to clarify that peaceful citizens cannot be denied the right to express themselves in residential neighborhoods. Censorship of residential picketing is completely alien to our system of government and should be resoundingly rejected by this Court. Otherwise, the lower courts will continue to disregard or distort this Court's decisions and fundamental freedoms will continue to be suppressed under the guise of solicitude for residential privacy.

CONCLUSION

The decision of the Supreme Court of New Jersey is riddled with constitutional errors that represent a radical departure from the applicable decisions of this Court. In particular, the decision below is in direct conflict with this Court's decision in *Madsen v. Women's Health Center, Inc.* and the Sixth Circuit's subsequent decision in *Vittitow v. City of Arlington*. Therefore, this Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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February 24, 1995

649 A.2d 1253

SUPREME COURT OF NEW JERSEY

BELINDA MURRAY AND ELRICK A. MURRAY, M.D., PLAINTIFFS-RESPONDENTS v. MICHAEL ANDREW LAWSON, DAVID CRIST, JANE DOE (A FICTITIOUS NAME) AND JOHN DOE (A FICTITIOUS NAME), DEFENDANTS-APPELLANTS.

Argued November 7, 1994 –
Decided December 1, 1994.

SYNOPSIS

Physicians sought to enjoin antiabortion protestors from picketing in front of their residences. The Superior Court, Chancery Division, Essex County, entered permanent injunction in favor of one physician and granted restraining order with respect to other. Protestors appealed. The Superior Court, Appellate Division, 264 N.J.Super. 17, 624 A.2d 3, affirmed as to one physician and, 264 N.J.Super. 11, 624 A.2d 1, affirmed as modified as to the other. Appeal was taken. The Supreme Court of New Jersey, 136 N.J. 32, 642 A.2d 338, affirmed as modified and remanded. Protestors petitioned for writ of certiorari. The Supreme Court, 115 S.Ct. 44, granted certiorari, vacated judgment, and remanded. On remand, the Supreme Court of New Jersey, Clifford, J., held that: (1) injunction restricting picketing around private residence was not impermissible prior restraint; (2) injunction was content neutral and served significant government interest in protecting residential privacy; and (3) injunction would burden no more speech than necessary if it were modified to prohibit picketing unless it was 100 feet from physician's home, in group of ten or fewer protestors, no

more often than one hour every two weeks, and only after local police were notified.

Affirmed as modified.

Richard F. Collier, Jr., argued the cause for appellants.

Pamela Mandel argued the cause for respondents.

Frank L. Corrado argued the cause for *amicus curiae* American Civil Liberties Union of New Jersey (*Rossi, Barry, Corrado, Grassi & Radell* and *Marsha Wenk*, attorneys; *Mr. Corrado* and *Ms. Wenk*, on the briefs).

Charles J. Walsh argued the cause for *amicus curiae* The American College of Obstetricians and Gynecologists (*Sills, Cummis, Zukerman, Radin, Tischman, Epstein & Gross*, attorneys; *Mr. Walsh* and *Steven R. Rowland*, of counsel and on the letter briefs).

Andrea M. Silkowitz, Assistant Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Deborah T. Poritz*, Attorney General, attorney; *Jaynee Lavecchia*, Assistant Attorney General, of counsel).

Dara Klassel, a member of the New Jersey and New York bars, submitted a brief on behalf of *amici curiae* Planned Parenthood Federation of America and Planned Parenthood Affiliates of New Jersey (*Ansell, Zaro, Bennett and Grimm*, attorneys; *Ms. Klassel* and *Richard B. Ansell*, on the brief).

The opinion of the Court was delivered by

CLIFFORD, J.

In *Murray v. Lawson*, 136 *N.J.* 32, 642 *A.*2d 338 (1994), this Court upheld an injunction prohibiting defendants,

anti-abortion protestors, from picketing within 300 feet of the residence of plaintiffs, a physician who performs abortions and the physician's wife. We concluded that the injunction was a permissible time, place, and manner restriction on defendants' speech. Thereafter, the United States Supreme Court announced its decision in *Madsen v. Women's Health Center, Inc.*, 512 *U.S.* ___, 114 *S.Ct.* 2516, 129 *L.Ed.* 2d 593 (1994), which held impermissible under a stricter constitutional standard an injunction prohibiting anti-abortion protestors from picketing within 300 feet of the residence of any owner, agent, staff member, or employee of the defendant in that case, a clinic at which abortions are performed.

The *Murray* defendants petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, vacated our earlier judgment, and remanded the cause to this Court "for further consideration in light of *Madsen*." ___ *U.S.* ___, ___, 115 *S.Ct.* 44, 44, 130 *L.Ed.*2d 6, ___ (1994). Having revisited our earlier decision, we are persuaded that the 300-foot restriction we upheld in *Murray* cannot remain in place and that we must alter the terms of the injunction.

I

The facts are set forth in detail in *Murray, supra*, 136 *N.J.* at 36-40, 642 *A.*2d 338. We repeat here only those facts that are relevant to the remand from the United States Supreme Court.

Plaintiff Dr. Elrick Murray is a licensed obstetrician and gynecologist with a private practice in Plainfield. Dr. Murray performs abortions at several hospitals and

clinics in New Jersey. He and his wife, plaintiff Belinda Murray, live with their three children in a suburban neighborhood of Westfield. In 1991 the children were ages six, eleven, and fifteen. For about two years before January 1991, defendants regularly demonstrated against abortion by picketing at one of the clinics where Dr. Murray performs abortions.

On December 14, 1990, defendant Lawson, having discovered Dr. Murray's Westfield address, went to that address to determine whether it was current. Lawson was surprised to find a residence instead of an office. Lawson rang the doorbell and plaintiffs' then-fourteen-year-old son answered the door. After confirming that the house was the Murray residence, Lawson told the boy to tell his father to stop doing abortions. Mrs. Murray came to the door and told Lawson to leave and not to return. He left immediately. Mrs. Murray testified that the visit frightened and upset her.

About a month later, Lawson informed the Westfield police that approximately fifty people planned to picket peacefully outside the Murray residence on Sunday, January 20, 1991. The administrator of one of the clinics at which Dr. Murray worked warned him about the protest. On the advice of the Westfield police, Dr. Murray sent his family away for the day but he remained at home.

On January 20 two police officers met the fifty-seven picketers at a nearby school, instructed them on basic picketing rules, and escorted them to the sidewalk in front of the Murray residence. The picketers walked in a single-file loop on the sidewalk in front of the Murray residence and in front of about ten surrounding houses.

Defendants, walking generally two abreast but sometimes four or five abreast, carried signs that stated variously, "Dr. Murray scars women and kills their unborn children," "Elrick Murray pre-born baby exterminator and nomad abortionist," and they exhibited a placard that showed a decapitated infant with the caption "Elrick Murray, abortionist." Defendants also spoke to several neighbors including one teenager whom they asked whether he knew that a killer lived in the neighborhood.

In February 1991 plaintiffs filed suit in the Chancery Division seeking damages and injunctive relief against defendants, Lawson, Crist, and fictiously-named others. The complaint charged Lawson with trespass and charged all defendants with disruption of plaintiffs' use and enjoyment of their property, intrusion on their seclusion, damage to Dr. Murray's professional reputation and pecuniary interests, and deprivation of the right to privacy under the State and federal constitutions. On February 8, 1991, the first scheduled hearing date of the case, defendants Lawson and Crist picketed for about fifteen minutes on the sidewalk in front of plaintiffs' residence and in front of other residences on the block.

After a hearing on February 14 and 22, 1991, the Chancery Division entered a temporary restraining order restricting the picketers from using the words "murderer" or "killer," from referring to members of the Murray family by name, from carrying the sign with the decapitated fetus, and from hand-delivering written material to residents of the neighborhood. The order also limited defendants' picketing to two persons, for one hour, every three weeks.

No demonstrators picketed at the Murray residence until May 4, 1991. On April 22, 1991, however, one of the clinics at which Dr. Murray performed abortions burned to the ground under circumstances that persuaded police and fire officials that the fire had been the work of an arsonist. Between April 22 and May 4, 1991, defendant Lawson picketed at another clinic and at Dr. Murray's office. On May 2, 1991, another clinic at which Dr. Murray performed abortions received a bomb threat, causing the police to evacuate the site. Authorities never determined who was responsible for the fire or for the bomb threat. Although no evidence linked defendants to the arson or to the warning of a bomb, the doctor felt threatened by and fearful of defendants.

On May 4, 1991, two days after the bomb threat, defendant Lawson and another picketer reappeared to picket in front of the Murray Residence. Dr. Murray called the police. After the police arrived, the doctor came out of his house and engaged in a heated verbal exchange with the picketers. At the urging of the police, Dr. Murray returned to his house, but then emerged again and took a swing at Lawson. Dr. Murray was later convicted of simple assault in the Westfield Municipal Court.

After a final hearing, the Chancery Division entered a permanent injunction in July 1991, prohibiting "defendants and all persons in active concert or participation with them * * * from picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence * * *." The court dismissed the claim of interference with Dr. Murray's profession, considered the claim for interference with use

and enjoyment of property as subsumed under the tortious-invasion-of-privacy claim, found Lawson's trespass irrelevant to the picketing, and declined to award money damages for plaintiffs' invasion-of-privacy and intentional-infliction-of-emotional-distress claims.

Defendants appealed the trial court's issuance of the injunction. Plaintiffs did not cross-appeal the court's other rulings. In a published opinion, the Appellate Division upheld the 300-foot restriction, 264 *N.J.Super.* 17, 624, *A.*2d 3 (1993), finding that the trial court had the authority to issue the injunction and that the restrictions contained therein survived defendants' free-speech challenge.

We granted defendants' petition for certification, 133 *N.J.* 445, 627 *A.*2d 1149 (1993), and thereafter affirmed the Appellate Division's judgment upholding the injunction. We determined that the Chancery Division did have the authority to issue the injunction and that the 300-foot restriction contained therein was a permissible time, place, and manner restriction on defendants' speech. *Murray, supra,* 136 *N.J.* 32, 642 *A.*2d 338.

First, we concluded that the injunction was content neutral. We reasoned that although the injunction restricted the speech of only anti-abortion protestors, the Chancery Division had imposed it not because of the protestors' viewpoint but rather only because defendants' conduct had interfered with plaintiffs' residential privacy. *Id.* at 45-46, 642 *A.*2d 338. Next, we decided that protection of residential privacy constitutes a significant government interest justifying the imposition of injunctive restrictions. *Id.* at 47-49, 642 *A.*2d 338. To support that

proposition we relied on our common law and on the United States Supreme Court decision in *Frisby v. Schultz*, 487 *U.S.* 474, 484, 108 *S.Ct.* 2495, 2502, 101 *L.Ed.*2d 420, 431 (1988) (concluding that protection of residential privacy is significant government interest). Finally, we found that the 300-foot ban had been narrowly tailored to promote that significant government interest in the protection of residential privacy. *Id.* at 51-53, 642 *A.*2d 338.

As ordered by the United States Supreme Court, we now reconsider the foregoing holdings in light of *Madsen, supra*, 512 *U.S.* ___, 114 *S.Ct.* 2516, 129 *L.Ed.*2d 593.

II

Because *Madsen* necessarily determines the outcome here, we outline the Court's opinion in that case in some detail. In *Madsen*, the respondents operated abortion clinics throughout central Florida, including one such clinic on a highway called "Dixie Way" in Melbourne. The petitioners, anti-abortion protestors, picketed and demonstrated outside the clinic. 512 *U.S.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603. In September 1992 a Florida state court issued a permanent injunction prohibiting the protestors "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic." *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603. Six months later, the clinic sought to expand the restrictions. *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603. The trial court made additional findings of fact and issued a broader injunction, which the Florida Supreme Court upheld and which eventually became the

subject of the United States Supreme Court's ruling in *Madsen*.

In respect of the protestors' continued activities at the clinic despite the existence of the earlier injunction, the trial court found that the protestors had "continued to impede access to the clinic by congregating on the paved portion of the street – Dixie Way – leading up to the clinic, and by marching in front of the clinic's driveways." *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603. Vehicles attempting to enter the clinic's parking lots had to reduce speed to allow the protestors to move out of the way, and as they slowed, sidewalk counselors would approach the vehicles and attempt to give the occupants antiabortion literature, and would urge them not to use the clinic's services. *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603. The people outside the clinic whose number varied from a mere handful to a throng of 400, would sing, chant, and use loudspeakers and bullhorns, *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603.

The trial court also found that the protestors' activities had affected the health of the clinic's patients. The difficulty in gaining access to the clinic had made the patients more anxious and tense, thereby requiring that they receive more sedation before undergoing surgical procedures, which in turn increased the risk of such procedures. Moreover, patients inside the clinic could hear the noise from the protests, a circumstance that caused more stress during the procedures and during recovery. Finally, for those patients who chose not to enter the clinic because of the crowd, the risks to their health were increased by the delay. *Id.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 603.

The trial court also made findings related to the protestors' activities at the residences of the clinic's staff. The Florida Supreme Court appended to its own opinion the trial court's specific factual findings:

> G. On other occasions since the entry of the injunction * * *, the respondent * * * and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the 'home alone', minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passersby, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a 'baby killer'.
>
> H. On one occasion the respondent * * * with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent * * * remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling 'child murderer' and 'baby killer'. The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.
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> [626 So.2d 664, 677-78 (1993).]

Based on those findings, the trial court determined that the restraints imposed by its initial injunction were insufficient. See *Madsen, supra*, 512 *U.S.* at ___, 114 *S.Ct.* at 2521, 129 *L.Ed.*2d at 604. Accordingly, the trial court expanded the injunction on activities at the clinic by

providing that the protestors were prohibited from entering the clinic's premises; from blocking access to the clinic; from picketing within thirty-six feet of the clinic's property line; from making sounds or showing images that could be heard or seen inside the clinic; from approaching physically, within 300 feet of the clinic, any person seeking to use the clinic's services (unless such person indicates a desire to speak to the protestors); and from assaulting owners, staff, or patients of the clinic. *Id.* at ___, 114 *S.Ct.* at 2521-22, 129 *L.Ed.*2d at 604-05.

The trial court's expanded injunction also included restrictions protecting the clinic's owners, agents, staff, and employees at their homes. It prohibited the protestors

> [a]t all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300 feet of the residence of any of the [clinic's] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [clinic's] employees, staff, owners or agents. The [protestors] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.
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> [626 *So.*2d at 680.]

The Supreme Court of Florida upheld all portions of the expanded injunction against a free-speech challenge. 626 *So.*2d 664 (1993). After granting certiorari 510 *U.S.* ___, 114 *S.Ct.* 907, 127 *L.Ed.*2d 98 (1994), the United States Supreme Court upheld some provisions of the injunction and struck down others. First, the Court determined that the injunction was not content based, even though the injunction restricted the speech of only the anti-abortion protestors. The Court reasoned that the injunction was not an expression of hostility toward the protestors' message but a response to the protestors' repeated violations of the trial court's original order. *Madsen, supra,* 512 *U.S.* at ___, 114 *S.Ct.* at 2523-24, 129 *L.Ed.*2d at 606. Accordingly, the Court found that strict scrutiny was not the appropriate standard by which the Court should analyze the constitutionality of the injunction. *Id.* at ___, 114 *S.Ct.* at 2524, 129 *L.Ed.*2d at 607.

The Court then noted that if the underlying controversy had challenged a generally-applicable statute instead of an injunction, the Court "would determine whether the time, place, and manner regulations were 'narrowly tailored to serve a significant governmental interest.' " *Id.* at ___, 114 *S.Ct.* at 2524, 129 *L.Ed.*2d at 607 (quoting *Ward v. Rock Against Racism,* 491 *U.S.* 781, 791, 109 *S.Ct.* 2746, 2753, 105 *L.Ed.*2d 661, 675 (1989)). However, focusing on the differences between injunctions and generally-applicable statutes, the Court found that a different standard was required. A statute results from a legislative choice regarding the promotion of a specific societal interest, but an injunction "can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." *Id.* at

___, 114 *S.Ct.* at 2524, 129 *L.Ed.*2d at 607. Because "[i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances," *id.* at ___, 114 *S.Ct.* at 2524, 129 *L.Ed.*2d at 607, they should be "no broader than necessary to achieve [their] desired goals." *Id.* at ___, 114 *S.Ct.* at 2525, 129 *L.Ed.*2d at 608. Accordingly, the Court determined that the test to be applied in the evaluation of a content-neutral injunction should be "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at ___, 114 *S.Ct.* at 2525, 129 *L.Ed.*2d at 608.

Applying that test to the Florida clinic restrictions, the Court first agreed with the Florida Supreme Court's conclusion that numerous significant state interests justified the issuance of injunctive relief: "ensuring the public safety and order, * * * promoting the free flow of traffic on public streets and sidewalks, * * * protecting the property rights of all its citizens," *id.* at ___, 114 *S.Ct.* at 2526, 129 *L.Ed.*2d at 609, and securing medical privacy, *ibid.* The Court then turned to whether the specific restrictions imposed on the activity outside the clinic burdened more speech than necessary to serve those goals.

The Court upheld two of the restrictions on the protestors' activities around the clinic. First, it upheld the validity of the thirty-six-foot-buffer zone, finding that "[t]he state court seems to have had few other options to protect access given the narrow confines around the clinic." *Id.* at ___, 114 *S.Ct.* at 2527, 129 *L.Ed.*2d at 610. The Court also recognized that although "[t]he need for a

complete buffer zone near the clinic entrances and driveway may be debatable, * * * some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Id.* at ___, 114 *S.Ct.* at 2527, 129 *L.Ed.*2d at 610-11. The Court also upheld the noise restrictions, finding that they "burden[ed] no more speech than necessary to ensure the health and well-being of the patients at the clinic." *Id.* at ___, 114 *S.Ct.* at 2528, 129 *L.Ed.*2d at 612.

The Supreme Court also struck down several of the injunctive order's restrictions. For example, the Court found unconstitutional that portion of the thirty-six-foot-buffer-zone restriction that included private property, concluding that that restriction "burden[ed] more speech than necessary to protect access to the clinic." *Id.* at ___, 114 *S.Ct.* at 2528, 129 *L.Ed.*2d at 612. The Court also struck down the images-observable-within-the-clinic restriction, determining that it burdened more speech than necessary to protect the patients and their families; the clinic could merely pull its curtains so that patients could avoid seeing images that they found disagreeable. *Id.* at ___, 114 *S.Ct.* at 2529, 129 *L.Ed.*2d at 612-13. Finally, the Court found impermissible the prohibition on physically approaching patients within 300 feet of the clinic (unless the patients indicated a desire to be approached), concluding that it too "burden[ed] more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.* at ___, 114 *S.Ct.* at 2529, 129 *L.Ed.*2d at 613.

Moving to the residential restrictions, the Court first noted that the same analysis that applied to the noise

restrictions around the clinic applied to the noise restrictions around the residences. *Id.* at ___, 114 *S.Ct.* at 2529, 129 *L.Ed.*2d at 613-14. Then the Court struck down the restriction prohibiting picketing within a 300-foot zone around the residences of clinic owners, agents, staff, and employees. The Court noted that in *Frisby, supra,* 487 *U.S.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431, it had previously recognized that the protection of residential privacy is a State interest of the highest order. *Id.* at ___, 114 *S.Ct.* at 2529-30, 129 *L.Ed.*2d at 614. But it found that the restriction in *Madsen* burdened more speech than necessary to protect that interest:

> [T]he 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby.* * * * The prohibition was limited to 'focused picketing taking place solely in front of a particular residence.' By contrast, the 300-foot zone would ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.' *The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.*
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> [*Id.* at ___, 114 *S.Ct.* at 2530, 129 *L.Ed.*2d at 614 (quoting *Frisby, supra,* 487 *U.S.* at 483, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431) (emphasis added).]

Finally, the Court rejected vagueness and overbreadth challenges to the injunction as well as a freedom-of-association challenge. *Id.* at ___, 114 *S.Ct.* at 2530, 129 *L.Ed.*2d at 614. We note, too, that three Justices would

have found the injunction content-based and would have used the strict-scrutiny standard to determine whether the injunction in *Madsen* passed muster under the First Amendment, see *id.* at ___ - ___, 114 *S.Ct.* at 2537-40, 129 *L.Ed.*2d at 623-27 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in judgment in part and dissenting in part), and that another Justice would have adopted a more lenient standard than that enunciated by the majority in determining whether an injunction survives a free-speech challenge, see *id.* at ___, 114 *S.Ct.* at 2531-34, 129 *L.Ed.*2d at 615-16 (Stevens J., concurring in part and dissenting in part).

III

First, we address defendants' claim that this Court should not apply *Madsen* at all because unlike the injunction in that case, the injunction at issue here is a "prior restraint" on speech and thus presumptively unconstitutional. That argument is based on a footnote in the United States Supreme Court's opinion in *Madsen:*

> We also decline to adopt the prior restraint analysis urged by petitioners. Prior restraints do often take the form of injunctions. Not all injunctions which may incidentally affect expression, however, are "prior restraints" in the sense that that term [i]s used [in earlier opinions of the Court]. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was not issued because of the content of petitioners' expression but because of their prior unlawful conduct.
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> [512 *U.S.* at ___ n. 2, 114 *S.Ct.* at 2524 n. 2, 129 *L.Ed.*2d at 607 n. 1 (citations omitted).]

Defendants argue that because no unlawful conduct occurred in this case, the Murray injunction must necessarily be evaluated under prior-restraint doctrine and not under the standard that the Court applied in *Madsen*. Thus, defendants assert, "In determining which standard of review applies, the crucial distinction is whether * * * the challenged injunction was based on a finding of 'prior unlawful conduct.' " We do not agree.

Generally, "[t]he term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' " *Alexander v. United States*, 509 *U.S.* ___, ___, 113 *S.Ct.* 2766, 2771, 125 *L.Ed.*2d 441, 450 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03 at 4-14 (1984)); *see also* Laurence H. Tribe, *American Constitutional Law* § 12-24 at 1040 (2d ed. 1988) (noting that central feature of prior restraint is "attempt[ ] to suppress speech prior to publication * * * "). Injunctions are often "classic examples of prior restraints." *Alexander, supra*, 509 *U.S.* at ___, 113 *S.Ct.* at 2771, 125 *L.Ed.*2d at 450. But as the Supreme Court noted in *Madsen*, not all injunctions that "incidentally affect expression * * * are 'prior restraints' * * * ." 512 *U.S.* at ___ n. 2, 114 *S.Ct.* at 2524 n. 2, 129 *L.Ed.*2d at 607 n. 2.

Although never outlining a precise test, the Supreme Court has considered a number of factors in determining

whether a restriction is a prior restraint. One of those factors is whether the restraint prevents the expression of a message. *See ibid.* ("Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone."); *Alexander, supra,* 509 *U.S.* at ___, 113 *S.Ct.* at 2771, 125 *L.Ed.*2d at 450 (finding that order requiring petitioner to forfeit property related to racketeering activity was not prior restraint because it "does not *forbid* petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities"). Thus, the Supreme Court has consistently found (often without discussion) that injunctions are prior restraints if they forbid entirely the publication of a message. Examples of cases involving prior restraints are *CBS, Inc. v. Davis,* 510 *U.S.* ___, 114 *S.Ct.* 912, 127 *L.Ed.*2d 358 (1994) (enjoining CBS from airing video taken at meat-packing company); *National Socialist Party of America v. Village of Skokie,* 432 *U.S.* 43, 97 *S.Ct.* 2205, 53 *L.Ed.*2d 96 (1977) (enjoining petitioners from marching, walking, parading, distributing pamphlets, or displaying materials within town); *Nebraska Press Ass'n v. Stuart,* 427 *U.S.* 539, 96 *S.Ct.* 2791, 49 *L.Ed.*2d 683 (1976) (enjoining news media from publishing or broadcasting accounts of defendant's confessions and admissions until jury was impaneled); *New York Times Co. v. United States,* 403 *U.S.* 713, 91 *S.Ct.* 2140, 29 *L.Ed.*2d 822 (1971) (attempting to enjoin newspapers from publishing contents of classified study regarding decision-making process on United States' Vietnam policy); *Carroll v. President & Commissioners of Princess Anne,*

393 *U.S.* 175, 89 *S.Ct.* 347, 21 *L.Ed.*2d 325 (1968) (restraining white supremist organization from rallying). However, "The Court frequently finds that regulations with only indirect or minor effects on speech are not really prior restraints at all." Tribe, *supra,* § 12-36 at 1051 n. 37. See, *e.g., Arcara v. Cloud Books, Inc.,* 478 *U.S.* 697, 705 n. 2, 106 *S.Ct.* 3172, 3177 n. 2, 92 *L.Ed.*2d 568, 577 n. 2 (1986) (noting that closure of adult bookstore differs from prior restraints because "order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location * * * "); *Seattle Times Co. v. Rhinehart,* 467 *U.S.* 20, 34, 104 *S.Ct.* 2199, 2208, 81 *L.Ed.*2d 17, 27 (finding that order prohibiting dissemination of information obtained through discovery before trial is not prior restraint because "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes"), *cert. denied,* 467 *U.S.* 1230, 104 *S.Ct.* 2690, 81 *L.Ed.*2d 884 (1984).

The injunction at issue here, like the *Madsen* injunction, does not forbid defendants from expressing their message; they are simply prohibited from expressing it by picketing within the 300-foot zone that the injunction establishes. Defendants can picket on the remainder of the Murrays' block (the injunction bans picketing within 300 feet of the Murray residence and the block on which they live is 1800 feet long); throughout the rest of the neighborhood; and at the offices, clinics, and hospitals out of which Dr. Murray works. Moreover, as *amicus curiae* American College of Obstetricians and Gynecologists asserts, the injunction does not preclude defendants

from engaging in other forms of communication even within the protected zone. *Amicus curiae* Attorney General points out that the injunction does not preclude distributing leaflets or engaging in door-to-door canvassing. Only the picketing targeted at the Murray residence was prohibited because only that activity was found inherently and offensively to interfere with plaintiffs' residential privacy.

Another factor in determining whether a restriction imposes a prior restraint on speech is whether the injunction was issued because of the content of the expression. *See Madsen, supra,* 512 *U.S.* at ___ n. 2, 114 *S.Ct.* at 2524 n. 2, 129 *L.Ed.*2d at 607 n. 2 ("Moreover, *the injunction was issued not because of the content of petitioners' expression* * * * but because of their prior unlawful conduct." (emphasis added)). In *Southeastern Promotions, Ltd. v. Conrad,* 420 *U.S.* 546, 95 *S.Ct.* 1239, 43 *L.Ed.*2d 448 (1975), the Court emphasized that licensing or regulatory systems that focus on content are invalid prior restraints because they result in censorship. The issue in *Southeastern Promotions, Ltd.* was "whether First Amendment rights were abridged when respondents denied petitioner the use of a municipal facility in Chattanooga, Tennessee, for the showing of the controversial rock musical 'Hair.' " *Id.* at 547, 95 *S.Ct.* at 1241, 43 *L.Ed.*2d at 452. The Court found that the system by which the Chattanooga Board regulated the use of its facilities resulted in prior restraints on speech because it did not operate pursuant to acceptable standards. "One seeking to use a theater was required to apply to the board. The Board was empowered to determine whether the applicant should be granted permission * * * *on the basis of its review of the content of the*

production." Id. at 554, 95 *S.Ct.* at 1244, 43 *L.Ed.*2d at 456-57 (emphasis added). The Court's finding of a prior restraint in that case reflected society's "distaste for censorship." *Id.* at 553, 95 *S.Ct.* at 1244, 43 *L.Ed.*2d at 456.

The injunction here, however, was not entered because of the content of defendants' message, despite defendants' and *amicus curiae* American Civil Liberties Union of New Jersey's (ACLUNJ's) strong protestations to the contrary. Defendants and ACLUNJ assert that the Supreme Court's opinion in *Madsen* requires this Court to find that if an injunction affecting speech is not issued to remedy a past or threatened violation of the law, no basis other than the content of the speech exists to justify the regulation. That is not at all the case. We are not persuaded that our conclusion in *Murray, supra,* 136 *N.J.* at 45, 642 *A.*2d 338, that the injunction at issue is content neutral was error.

Although not imposed to remedy unlawful conduct, this injunction is justified on a basis other than the content of defendants' speech: the court granted it to protect the Murrays from targeted picketing that inherently and offensively interfered with their residential privacy. Thus, the injunction was entered pursuant to the court's authority to grant equitable relief to enforce a valid public policy of this State. *See id.* at 42-44, 642 *A.*2d 338. As the Court has noted in the labor-picketing context, "a State, in enforcing some public policy, * * * whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *International Bhd. of Teamsters v. Vogt, Inc.,* 354 *U.S.* 284, 293, 77 *S.Ct.* 1166, 1171, 1 *L.Ed.*2d 1347, 1353, *reh'g denied,* 354 *U.S.* 945, 77 *S.Ct.* 1423, 1 *L.Ed.*2d 1558 (1957). In *Murray,* we gave detailed

consideration to the public policy favoring protection of residential privacy and explained why that policy is sufficiently strong to implicate a significant government interest, 136 *N.J.* at 47-50, 642 *A.*2d 338, and we need not repeat that discussion here. Moreover, the United States Supreme Court confirmed in *Madsen* that protection of residential privacy is a significant government interest. 512 *U.S.* at ___, 114 *S.Ct.* at 2530, 129 *L.Ed.*2d at 614 (stating that " ' "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order." ' " (quoting *Frisby, supra,* 487 *U.S.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431 (quoting *Carey v. Brown,* 447 *U.S.* 455, 471, 100 *S.Ct.* 2286, 2296, 65 *L.Ed.*2d 263, 276 (1980))).

We also rejected defendants' other arguments that the injunction is content based. Our analysis in *Murray,* 136 *N.J.* at 45-47, 642 *A.*2d 338, which concludes that an injunction is not necessarily aimed at content merely because it restrains only a specific group of speakers, appears to be entirely consistent with *Madsen.* See 512 *U.S.* at ___, 114 *S.Ct.* at 2524, 129 *L.Ed.*2d at 606 ("In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."). We reject as well the argument that the trial court entered the injunction here because of the Murrays' reaction to the content of defendants' speech. As the trial court noted, "the [c]ourt is assessing whether defendants have intruded into plaintiffs' privacy, not whether plaintiffs are disgruntled by what defendants are expressing."

In sum, this injunction is not a pre-publication restraint or the result of a discriminatory licensing or regulatory system, characteristics of cases invalidated

under prior restraint doctrine; nor does the injunction forbid defendants from expressing their message or restrict their activities merely because of the position that their message articulates. Therefore, the injunction is not a "prior restraint." Even if that were not the case, however, this injunction would fall within at least one "established exception to the doctrine of prior restraint," *Southeastern Promotions, Ltd., supra,* 420 *U.S.* at 555, 95 *S.Ct.* at 1245, 43 *L.Ed.*2d at 457, in that it would be permissible to protect a "captive audience." *Id.* at 556, 95 *S.Ct.* at 1245, 43 *L.Ed.*2d at 457. As the Supreme Court noted in *Frisby, supra,* targeted residential picketing can make residents captive listeners within their homes, and therefore "protection of the unwilling listener" is an important component of residential privacy. 487 *U.S.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431; *see also* Hazel A. Landwehr, Note, *Unfriendly Persuasion: Enjoining Residential Picketing,* 43 *Duke L.J.* 148, 158 (1993) (noting that State's "ability to control the flow of ideas into the home is based not only on a concern for preserving the sanctity of the home but also on a recognition that homeowners present a captive audience for speakers").

IV

We now turn to the question whether the injunction that we upheld in *Murray,* prohibiting picketing within 300 feet of the Murray residence, runs afoul of *Madsen.* We conclude that as currently structured, the injunction does not satisfy the stricter standards that the United States Supreme Court announced in *Madsen.*

That the injunction at issue here is content neutral and that it serves a significant government interest in protecting residential privacy is beyond question. See *supra* at 223-226, 649 *A.*2d at 1262-1263 (discussing reasons that this injunction meets *Madsen's* requirements of content neutrality and significant government interest). Therefore we proceed to the more difficult question: whether the injunction burdens more speech than necessary to serve that interest. In *Murray,* we held that the restriction banning picketing within 300 feet of the Murray residence was narrowly tailored to protect plaintiffs' residential privacy. *Id.* at 51-53, 642 *A.*2d 338. But the standard enunciated in *Madsen* is more stringent. We conclude that under the stricter standard a 300-foot speech-free zone cannot be sustained on this record. However, recognizing the desirability of bringing these proceedings to a conclusion, we choose not to remand for further hearings but rather to modify the injunction consistent with our understanding of the dictates of *Madsen.*

To repeat, in *Madsen,* to justify the 300-foot restriction around the residences of all owners, agents, staff, and employees of the clinic, the trial court made only the following findings in respect to the protestors' activities:

> G. On other occasions since the entry of the injunction * * * , the respondent * * * and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the 'home alone', minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passersby,

> contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a 'baby killer'.
>
> H. On one occasion the respondent * * * with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent * * * remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling 'child murderer' and 'baby killer'. The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

[626 *So.*2d at 677-78.]

Noticeably absent in those findings is any reference to, much less any detailed description of, the physical surroundings of the residences of the owners, agents, staff, and employees of the clinic. The findings recited above appear to indicate only that some of those persons lived in houses in residential neighborhoods and in motels, and that the protestors picketed and protested at several locations. Nothing specific in those findings showed that a 300-foot restriction was necessary in every (or even in any single) instance to protect the privacy of the residents. Finding that "[t]he record before us does not contain sufficient justification for this broad a ban on picketing," the United States Supreme Court therefore vacated the injunction, 512 *U.S.* at ___, 114 *S.Ct.* at 2530, 129 *L.Ed.*2d at 614, at the same time pointedly observing that "a limitation on the time, duration of picketing, and number of pickets *outside a smaller zone* could have accomplished the desired result." *Ibid.* (emphasis added).

In sharp contrast to the sparse findings of the state court in *Madsen*, however, is the well-developed record before us in this case. The record demonstrates that defendants' conduct invaded the Murrays' residential privacy and that therefore some form of injunctive relief was necessary to protect plaintiffs' interest. Even defendants recognized at oral argument that peaceful *targeted* picketing can be enjoined to prevent the invasion of residential privacy. As the ACLU acknowledged, one aspect of heightened concern in this case was the fact that during the original picketing, although defendants marched a route of approximately ten houses, at no time was the area in front of plaintiffs' house free from picketers. Thus, injunctive relief is necessary here to protect plaintiffs from being "under siege" by defendants. The question then becomes whether the 300-foot restriction is appropriate, and if not, whether the record before us is sufficient to enable us to rewrite the "buffer zone" provision to burden no more speech than is necessary to protect plaintiffs' residential privacy.

Although the trial court did not set forth its reasons for abandoning the preliminary injunction's restrictions (limiting picketing to two persons, every third week, for one hour) in favor of a 300-foot picket-free zone, the record fully supports the decision to impose some form of buffer. Unlike the trial court in *Madsen*, from the outset the trial court in this case gave painstaking consideration to the physical layout of the neighborhood and made an exhaustive appraisal of defendants' picketing. Even in its earliest hearing in the case, on February 8, 1991, on plaintiffs' application for a temporary restraint, the court

was concerned with drafting an injunction tailored to the precise facts at issue:

> And for the record let me just say that I'm familiar generally with the street, although if I recall – I haven't been on it in awhile. If I recall correctly, it isn't a continuous street it goes down to one street and stops and then if you're trying to find it you have to do like a dog leg and then you go down the street again and if I recall correctly, the neighborhoods are not identical. In other words, some blocks have very narrow lots and others have large lots.
>
> Now, I don't know what Dr. Murray has. I'd be very interested in knowing that because if this is on a block where all the frontages are a hundred or 200 feet wide, where there are less houses, as opposed to lots that are 40 or 50 feet wide, that would influence me simply because it might have some relationship to the concentration of people in a smaller area who want to relax on Sunday.

Instead of issuing a temporary restraint at that first hearing, however, the court continued the hearing to another date to allow defendants to submit further certifications. By the time of that subsequent hearing, the trial court had personally examined plaintiffs' neighborhood.

> I want to place on the record the fact that I drove down the street, the 900 block, and I think Dr. Murray's house is 917. I looked at his house from the outside and I looked at the houses on the block, on both sides of the street.
>
> * * * There [are] no vacant lots, it's not rural, it's strictly a suburban town, all improvements, improved street, curb, mostly sidewalks,

but not entirely. It appears to me every lot has a one-family house on it. [I]t appears to me the lot sizes run anywhere from 65 to 70 feet in frontage in that area. It's purely residential. * * * . [T]here's no commercial behind it or on either end of the block. * * * .

* * * That Dr. Murray is entitled to reasonable peace and quiet without harassment, without intrusion, without offensive language [is clear], and to a lesser extent the neighbors, but the neighbors are not my primary concern at this point * * * .

* * *

And it seems to me we have to be realistic here and protect Dr. Murray to the extent that I can, consistent with the price we all pay for freedom and that is to put up with peaceable activities of others, whom we violently disagree with * * * .

Based on that and other evidence, including a videotape of the initial picketing outside plaintiffs' house, the court's temporary order limited the picketing to two persons, every third week, for one hour. The court thus concluded that the 300-foot restriction that plaintiffs had originally requested was "for the time being excessive." But the court also noted,

> I'm going to allow them in front of the house on the public sidewalk. I will not require them, because it's only two, to be 50 or 300 feet away. Later on, when this – when the dust settles on this case, I would be more than happy to entertain a motion * * * , when I get a better feel for this case, if it's going to continue, to increase the number of pickets * * * . * * * .

> And secondly, [the injunction might change] by virtue of a distance that I might increase when we increase, if we do increase, the number of pickets. * * * .
>
> * * * [I]f I consider [allowing] more [picketers], I'm going to push you further away from the front of his house.

Before issuing its permanent injunction on July 25, 1991, the trial court heard testimony from plaintiffs and from several picketers, describing both plaintiffs' neighborhood and the picketing that had taken place. The court also viewed a number of photographs of the initial picketing. In imposing the 300-foot permanent order, the court noted:

> [I]t is clear that the first amendment protection of defendant's picketing must be tailored in accordance with the plaintiff's privacy interests. The former cannot be paramount in all instances. This would defy its limited First Amendment protection. * * * The latter cannot prevent expression completely.
>
> In light of its authority to fashion an equitable remedy, this court will enjoin the defendants from picketing within 300 feet of the plaintiffs' residence. They may move through the neighborhood, but they cannot come within 300 feet of the Murray's home.
>
> * * *
>
> In order that it be crystal clear, in referring to the tax map of the town of Westfield * * * , I note that Dr. Murray's house is on block 643 on lot 12 that he faces on Carlton Road, a distance which I have previously indicated. [Plaintiffs' house is set back approximately twenty-five feet

from the sidewalk on a 600-yard-long, thirty-three yard-wide block of Carlton Road.] That street is bounded by the intersection on the west by Grove Street, on the east by Clifton Street. On the remaining block in the back to the north is Central Avenue, which I take cognizance of the fact it is a rather busy street * * * . [H]owever, I'm satisfied based upon the pictures which are in evidence, based upon the testimony and the undisputed fact that Carlton Road itself is a completely residential street on both sides, so is Grove Street, so is Clifton Street. To the south is a street entitled The Boulevard. * * * . [T]he whole area * * * might be characterized, "the neighborhood," although I'm not limiting the neighborhood to those streets. I'm just trying to give anyone reading this opinion a rough idea of what the immediate neighborhood is like.

> Consequently, absent any further legislative response from the Town of Westfield, this court will not restrict the peaceable picketing any further than what I have indicated. Such restrictions are consistent with the First Amendment protection afforded to defendants without intruding upon plaintiff's privacy.

The court entered a final order to that effect on July 25, 1991.

The foregoing recital demonstrates that the trial court developed an extensive record before making its determination: it watched a videotape and looked at pictures of the protesting; it heard the testimony of the picketers and the Murrays; it personally examined the residential street in question; and it consulted the town tax map.

Moreover, the trial court was aware not only of unpleasant incidents that had preceded the issuance of the preliminary injunction (including one in which a neighbor of plaintiffs turned a sprinkler on the picketers and later received an unsigned postcard, never connected to defendants but nevertheless a source of concern to plaintiffs, warning that "people who live in wood houses shouldn't waste water") but also of the confrontation between Dr. Murray and the picketers that culminated in Murray's assault on Lawson. Those circumstances were therefore sufficiently lacking in serenity as to justify the trial court's adoption of a bright-line zone to eliminate confusion.

Missing from this record, however, is any explanation of why the trial court chose a picket-free zone of precisely 300 feet. When asked at oral argument what in the record justified such a large free zone, plaintiffs' reply was only that this Court should defer to the trial court. *Amicus curiae* American college of Obstetricians and Gynecologists asserted that if the trial court had known at the time of its decision the "talismanic" words "burdens no more speech than necessary," it would have used them. On our review under the Supreme Court's more stringent standard, those responses are hardly satisfactory.

Defendants suggested at oral argument that cases from other courts imposing large picketing-free zones in residential areas had convinced the trial court that a 300-foot zone would be permissible. For example, on September 14, 1990, another Chancery Division court had imposed a temporary restraining order in *Boffard v.*

Barnes, prohibiting anti-abortion protestors from picketing within 200 feet of the cul-de-sac on which was located the residence of a physician who performs abortions. (The preliminary and permanent injunctions, however, issued after the trial court's order herein, ultimately prohibited picketing "within the immediate vicinity" of the plaintiffs' residence.) 248 *N.J.Super.* 501, 591 *A.*2d 699 (1991), *aff'd in part and rev'd in part,* 264 *N.J.Super.* 11, 624 *A.*2d 1 (App.Div.1993), *aff'd as modified and remanded,* 136 *N.J.* 32, 642 *A.*2d 338 (1994). And in a Texas case the court upheld a ban prohibiting picketing within 400 feet of a physician's residence. *Valenzuela v. Aquino,* 800 *S.W.*2d 301 (Ct.App.1990), *aff'd in part and rev'd in part,* 853 *S.W.*2d 512 (1993). Although the trial court appropriately looked for guidance to decisions of other courts considering similar issues, an injunction must be crafted on a fact-specific basis. *See Horizon Health Ctr. v. Felicissimo,* 135 *N.J.* 126, 148, 638 *A.*2d 1260 (1994) ("Injunctions necessarily require an individualized balancing of rights."); *cf. R.* 4:52-4 (1994) (requiring that injunctions contain specific terms and describe in detail acts sought to be restrained).

The facts here lead us to the conclusion that a 300-foot restriction is too broad. As became clear at oral argument, if plaintiffs stayed within their residence or even walked out into their yard, the picketers and their placards would not likely be visible 300 feet away. Thus, keeping defendants at such a great distance, thereby rendering plaintiffs' awareness of the picketing most unlikely as a practical matter, is unnecessary to protect plaintiffs' residential-privacy interest. We have before us,

however, enough facts to permit us to tailor the restrictions appropriately, and the trial court would not likely be able to make any additional findings to aid in crafting those restrictions. Moreover, this Court's authority to modify injunctions to make them conform to law is well established. *See Horizon Health Ctr., supra,* 135 *N.J.* at 148, 638 *A.*2d 1260 ("When an injunction impermissibly exceeds applicable legal standards, appellate courts can modify or rewrite such an injunction to conform to those standards."); *see also Northeast Women's Ctr. v. McMonagle,* 939 *F.*2d 57, 67 (3d Cir.1991) ("We of course have the power to modify or even rewrite an injunctive order that exceeds permissible legal parameters."); *cf. New York Times Co. v. Sullivan,* 376 *U.S.* 254, 285, 84 *S.Ct.* 710, 728, 11 *L.Ed.*2d 686, 709 (1964) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.").

In redrafting the injunction, we will follow the United States Supreme Court's invitation in *Madsen* to impose "a limitation on the time, duration of picketing, and number of pickets outside a *smaller* zone * * * [to] accomplish[ ] the desired result[, protecting plaintiff's residential privacy]." *Id.* at ___, 114 *U.S.* at 2530, 129 *L.Ed.*2d at 614 (emphasis added). We note here that inasmuch as our modified injunction will impose a picket-free zone, albeit a zone smaller than 300 feet, we have declined to adopt defendants' and ACLU's position in respect of whether the injunction should contain a distance limitation at all. Those parties would have this Court require defendants to march a specific route (a loop

from one end of the Murrays' block to the other), with the picketers walking a specified distance apart from each other to provide for periods during which the space in front of plaintiffs' house is free from picketers. Defendants and ACLU argue that no distance limitation, no matter how small, is permissible, because no conduct-based factors are present (*e.g.*, prior violation of a judicial order, or unlawful or disorderly conduct) to warrant such relief. That view is inconsistent with our reading of *Madsen* that a smaller picket-free zone is permissible, even in the absence of such factors. Nowhere in their opinions did the Florida Supreme Court or the United States Supreme Court hinge their dispositions to the circumstance that the defendants in that case had engaged in violent, disorderly, or otherwise unlawful conduct outside the residences of the owners, agents, staff, or employees of the clinic. Moreover, a "free" zone here would provide for easier enforcement than would a complicated restriction of the type proposed by defendants and ACLU, given the limited resources dedicated to such matters and the need to ensure compliance with the injunction's terms.

Moving to the restriction itself, we do adopt many of defendants' and ACLU's other suggestions in respect of acceptable limitations on the number of picketers and the time and duration of the picketing, as well as a notification requirement. Thus, we replace the no-picketing-within-300-feet restriction that the trial court imposed and that we originally upheld under a less-stringent test in *Murray*, 136 *N.J.* 32, 642 *A.*2d 338, with the following:

> Defendants and all those in active concert or participation with them:

> (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the Murray residence, located at 917 Carlton Road, Westfield, New Jersey;
>
> (2) may picket in a group of no more than ten persons outside the 100-foot zone around the Murray residence for one hour every two weeks;
>
> (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing.

Under our understanding of *Madsen*, we conclude that the foregoing restrictions burden no more speech than necessary to protect plaintiffs' residential-privacy interest. A buffer of 100 feet is required here because it places the border of the zone approximately one-and-one-half lots away from the Murray residence; the Murrays will be free to enjoy their domestic tranquility inside their house, but if they choose to go out into their yard, they will see the picketers a mere lot-and-a-half away. Thus, defendants will be able to get their message across (if plaintiffs desire to look at it) but the modest buffer will relieve plaintiffs of the feeling that they are prisoners within their own home. Limiting the number of picketers to ten will prevent plaintiffs from feeling besieged by defendants, but will also assuage defendants' concern that if only a few picketers are allowed, the picketing will not be taken seriously by those viewing it because they would perceive the message to represent a marginal

viewpoint. Further, the picketing-every-two-weeks limitation allows defendants to demonstrate often enough to communicate their message without subjecting the Murrays to a constant barrage of picketing. Finally, the duration limitation gives defendants plenty of time in which to convey their message each time they picket; in fact, at oral argument defendants conceded that they would not likely want to picket for more than one to one-and-one-half hours at a time anyway.

Finally, we note that as ACLU stated at oral argument, although the original injunction technically allowed more speech (it placed no limits on the number of picketers, or on the time and duration of the picketing), that speech was less effective because defendants were so far away from plaintiffs. The modified restrictions allow defendants to communicate their message much closer to where the object of their message would likely become aware of it, thereby presumably making that speech more effective.

V

The judgment of the Appellate Division, 264 *N.J.Super.* 17, 624 *A.*2d 3, affirming the Chancery Division's permanent injunction prohibiting defendants from picketing within 300 feet of plaintiffs' residence is modified as set forth in this opinion. As modified the judgment is

Affirmed.

For modification and affirmance – Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, O'HERN, GARIBALDI and STEIN – 6.

Opposed – None.

Belinda MURRAY and Elrick A. Murray, M.D., Plaintiffs-Respondents,

v.

Michael Andrew LAWSON, David Crist, Jane Doe (a fictitious name) and John Doe (a fictitious name), Defendants-Appellants.

Virginia BOFFARD and Daryl K. Boffard, M.D., Plaintiffs-Respondents,

v.

Timothy BARNES, Dorothy Black, Carol Ford, Barbara Carlstrom, Jane Doe (a fictitious name) and John Doe (a fictitious name), Defendants-Appellants.

Nos.A-42 SEPT. TERM 1993, A-65 SEPT. TERM 1993.

Supreme Court of New Jersey.
April 6, 1994.

CLIFFORD

These cases, argued together before this Court, require a balance between the free-speech rights of anti-abortion protestors and the residential-privacy interest of two doctors and their families. In *Murray v. Lawson*, the Appellate Division upheld a permanent injunction by the Chancery Division prohibiting defendants, anti-abortion protestors, from picketing within 300 feet of plaintiffs' residence. 264 *N.J.Super.* 17 (1993). In *Boffard v. Barnes*, the same panel of the Appellate Division upheld a Chancery Division restriction forbidding defendants, anti-abortion protestors, from picketing within the immediate vicinity of plaintiffs' residence. 264 *N.J.Super.* 11 (1993). Defendants in both cases petitioned this Court. We granted certification, 133 *N.J.* 445 (1993), and 133 *N.J.* 446

(1993), to address the problems inherent in balancing free speech with residential privacy.

We now affirm the Appellate Division's judgment upholding the *Murray* injunction. We modify the judgment of the Appellate Division in *Boffard* and remand to the Chancery Division for a clarification of the restrictions contained in its injunction.

I

A. *Murray v. Lawson*

The facts are as set forth in the Appellate Division opinion, to which we make reference as necessary.

Plaintiff Dr. Elrick Murray is a New Jersey-licensed obstetrician and gynecologist with a private practice in Plainfield. Dr. Murray does not perform abortions at that office. He does, however, perform abortions at the Women's Medical Center in Howell, and at hospitals in Newark and in Watchung. 264 *N.J.Super.* at 22. He also performed abortions at the Medical Care Center in Woodbridge before that facility burned to the ground. *Id.* at 24. Dr. Murray and his wife, plaintiff Belinda Murray, live with their three children in Westfield in a suburban neighborhood. In 1991 the children were ages six, eleven, and fifteen. *Id.* at 22. Defendants regularly demonstrated against abortion by picketing at the Howell Clinic for about two years before January 1991. *Id.* at 23.

By engaging in some research in December 1990, defendant Lawson uncovered Plainfield and Westfield addresses for Dr. Murray. Lawson visited both addresses to confirm that they were current. On December 14, 1990,

when he went to the Westfield address, Lawson was surprised to find a residence and not an office. When Lawson rang the doorbell, plaintiffs' then-fourteen-year-old son answered the door. After confirming that the house was the Murray residence, Lawson told the boy to relay a message to his father to stop doing abortions. Mrs. Murray came to the door and told Lawson to leave and not return. Lawson left immediately. Mrs. Murray testified that Lawson's visit had frightened and upset her. *Ibid.*

About a month later, Lawson informed the Westfield police that he and approximately fifty other people planned to picket peacefully outside the Murray residence on Sunday, January 20, 1991. The administrator of the Medical Care Center in Woodbridge warned Dr. Murray about the Sunday protest. On the advice of the Westfield police, Dr. Murray sent his family away for the day but he remained inside the house himself. Ibid. Dr. Murray testified that he would have preferred to go to the hospital that day instead because two of his patients were in labor. *Id.* at 24.

On the afternoon of January 20 two police officers met the fifty-seven picketers at a nearby school, instructed them on basic picketing rules, and escorted them to the sidewalk in front of the Murray residence. *Id.* at 23. The picketers walked in a single-file loop on the sidewalk in front of the Murray residence and in front of about ten surrounding houses. Defendants walked generally two abreast but sometimes four or five abreast. *Ibid.* The picketers carried placards that stated, among other things, "Dr. Murray scars women and kills their unborn children," "Elrick Murray pre-born baby exterminator

and nomad abortionist," and they carried a placard that showed a decapitated infant with the caption "Elrick Murray, abortionist." *Id.* at 23-24. The picketers spoke to several neighbors including one teenager whom they asked whether he knew that a killer lived in the neighborhood. *Id.* at 23.

Plaintiffs testified that the demonstration had the following effects: (1) it deprived the Murrays of their usual Sunday family time; (2) it harmed Dr. Murray's ability to practice medicine because he was forced to remain home to manage his patients in labor in lieu of managing them at the hospital; (3) it caused Dr. Murray to curtail his professional work because he felt compelled to stay home more often; and (4) it caused Mrs. Murray to suffer from nervousness and depression. *Id.* at 24.

In February 1991 plaintiffs filed suit in the Chancery Division seeking damages and injunctive relief against defendants, Lawson, Crist, and fictitiously-named others. The five-count complaint charged Lawson with trespass and charged all defendants with disruption of plaintiffs' use and enjoyment of their property, intrusion on their seclusion, damage to Dr. Murray's professional reputation and pecuniary interests, and deprivation of the right to privacy under the United States and the New Jersey Constitutions. *Id.* at 21. On February 8, 1991, the first scheduled hearing date of the case, defendants Lawson and Crist picketed for about fifteen minutes on the sidewalk in front of plaintiffs' residence and in front of other residences on the block. *Id.* at 24.

After a hearing on February 14, 1991, the Chancery Division entered a temporary restraining order on February 22, restricting the picketers from using the words "murderer" or "killer," from referring to members of the Murray family by name, from carrying the sign with the decapitated fetus, and from hand-delivering written material to residents of the neighborhood. In addition, the order limited defendants' demonstrating to picketing by two persons, for one hour, every three weeks. *Id.* at 21 n.1.

No demonstrators picketed at the Murray residence until May 4, 1991. In the interim, however, on April 22, 1991, Dr. Murray discovered on arriving for work at the Medical Care Center in Woodbridge that the building had burned to the ground. Police and fire officials concluded that the fire had been the product of an arsonist. *Ibid.* Defendant Lawson picketed at the Howell clinic and at Dr. Murray's Plainfield office once between April 22 and May 4, 1991. On May 2, 1991, Howell Township police received a telephone message threatening the bombing of the Howell clinic, whereupon the police evacuated the site. *Id.* at 24-25. Authorities never determined conclusively who was responsible for the fire at the Woodbridge clinic or for the bomb threat to the Howell clinic.

Two days after the bomb threat, on May 4, 1991, Lawson and another picketer reappeared to protest in front of the Murray residence. Dr. Murray called the police. After they had arrived in response to his call, the doctor went outside and exchanged words, some of them heated, with the picketers. He returned to his house at the urging of police, but then went outside again and took a swing at Lawson. Although no evidence linked

defendants to the arson or to the bomb threat, Dr. Murray felt threatened by and fearful of defendants. Dr. Murray was later convicted of simple assault in the Westfield Municipal Court. *Id.* at 25.

After a final hearing, the Chancery Division entered a permanent injunction in July 1991, prohibiting "defendants and all persons in active concert or participation with them * * * from picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence * * * ." The Chancery Division also made other rulings: it dismissed the claim for interference with Dr. Murray's profession; it subsumed the claim for interference with use and enjoyment of property under the tortious invasion of privacy claim; it found Lawson's trespass irrelevant to the picketing; and it characterized plaintiffs' tort claims as invasion of privacy and intentional infliction of emotional distress, but because of the insufficiency of the proofs on those claims did not award money damages for either. *Id.* at 26.

On appeal, defendants claimed that the injunction violates separation-of-powers principles, is an impermissible prior restraint, violates defendants' free-speech rights, and is unwarranted because of Dr. Murray's "unclean hands" resulting from the assault on Lawson. Plaintiffs did not cross-appeal the Chancery Division's other rulings. *Id.* at 26-27.

The Appellate Division affirmed the 300-foot restriction. First, the court discerned no separation-of-powers problem, reasoning that the trial court has inherent equitable power to enforce a right to residential privacy, even in the absence of a local ordinance. *Id.* at 27-31. Second,

the Appellate Division found that the injunction survives a free-speech challenge because it is a reasonable time, place, and manner restriction. *Id.* at 31-36. Finally, the Appellate Division concluded that the trial court had not abused its discretion by failing to apply the "unclean hands" doctrine to deny plaintiffs equitable relief inasmuch as Dr. Murray's conduct had not been so egregious as to preclude such relief altogether. *Id.* at 36-38.

B. *Boffard v. Barnes*

Again we turn to the Appellate Division's reported decision for the factual recital.

Like Dr. Murray, plaintiff Dr. Daryl Boffard is a New Jersey-licensed obstetrician and gynecologist. 264 *N.J. Super.* at 13. He practices with an Irvington medical group that offers obstetrical and gynecological care, including abortion services. *Id.* at 13-14. Defendants, anti-abortion protestors, had been picketing the Irvington clinic for two years before they picketed the Boffard residence. Dr. Boffard lives in a house in Short Hills with his wife, plaintiff Virginia Boffard, and three young children. The Boffard residence is on a quiet cul-de-sac containing only one other house, and the street is so narrow that only one car at a time may traverse it. Because the Boffards do not have a backyard, their children play in the front yard of the house and on an adjoining lot. *Id.* at 14.

On September 8, 1990, approximately twenty picketers gathered in front of the Boffard residence. The picketers carried placards saying, among other things, "Dr. Daryl Boffard Kills Babies" and "God Says Thou Shalt

Not Kill." Other signs had pictures; one showed a mutilated full-term baby, and another showed bloody fetal parts with the caption "This is an abortion." When Mrs. Boffard approached the demonstrators, they refused to move. One demonstrator said to her, "Your husband is a murderer." Another demonstrator gave a teenage neighbor a bible and told her, "The doctor who lives there is a murderer." *Ibid.*

Defendants characterized their protest as peaceful. They claimed that only Mrs. Boffard had been disruptive and confrontational. In fact, one protestor called the police to report Mrs. Boffard's alleged hostile conduct. Two police officers arrived and instructed the protestors to picket only on the adjoining street. The protest ended after about one hour. *Ibid.*

Plaintiffs filed suit in the Chancery Division seeking to enjoin the picketing. They alleged that defendants, Barnes, Black, Ford, Carlstrom, and fictitiously-named others, had deprived them of the use and enjoyment of their property and that defendants had caused them mental and emotional pain and anguish. Accordingly, on September 14, 1990, the court issued a temporary restraining order, prohibiting defendants from picketing within 200 feet of the Short Hills cul-de-sac, from referring to Dr. Boffard as a "murderer" or a "killer," from depicting fetuses on placards, and from publishing plaintiffs' address. The order also limited to six the number of demonstrators who could protest near plaintiffs' residence. *Id.* at 14-15.

On April 8, 1991, the Chancery Division issued a preliminary injunction against defendants. 248 *N.J.Super.*

501 (1991). Five months thereafter, the Chancery Division made that preliminary injunction permanent. Both the preliminary and the permanent injunction provided: ORDERED that the defendants and all persons and organizations associated with or acting in concert or combination with them be ENJOINED and RESTRAINED as follows: 1. From gathering, parading, patrolling for the purpose of demonstrating or picketing within the immediate vicinity of plaintiffs' residence * * * . 2. Distributing flyers to plaintiffs' neighbors which contain references to [Dr. Boffard] as being a murderer or killer or his practice as involving murder or killing or which contains any other inflammatory language or which sets forth the plaintiffs' home address. 3. Carrying placards which contain depictions of a fetus * * * * [264 *N.J.Super.* at 13.]

On February 19, 1991, before the Chancery Division issued its preliminary and permanent injunctions, the Township Committee passed an ordinance, Section 15-1-28, stating: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of an individual in Millburn Township." No party has suggested that the Chancery Division relied on that ordinance in issuing the restrictions, and defendants do not challenge that ordinance in these proceedings.

On April 12, 1993, the same panel of the Appellate Division as upheld the *Murray* injunction upheld paragraph one of the *Boffard* injunction, prohibiting defendants from protesting "within the immediate vicinity" of the Boffard residence. 264 *N.J.Super.* at 16. The Appellate Division reasoned that the paragraph-one restriction is a constitutional time, place, and manner restriction. *Ibid.* The court struck down paragraphs two and three of the

injunction, however, finding that those restrictions are impermissibly content based. *Ibid.* On this appeal, therefore, we assess the validity of only the paragraph-one restriction.

II

Defendants in both cases assert that in the absence of violent conduct or conduct in violation of a statute or an ordinance, the Chancery Division has no inherent authority to impose injunctive restrictions on protected expression. Put differently, defendants argue that the judiciary may not issue an equitable remedy without proof of violence or legal liability. We do not agree.

In *Horizon Health Center v. Felicissimo*, 135 *N.J.* 126 (1994), decided today, we upheld the authority of the Chancery Division to issue an injunction restricting the expressive activities of anti-abortion protestors who had demonstrated peacefully outside an abortion and family-planning clinic. The defendants in that case made the same argument that defendants make here, namely, that the Chancery Division could not enjoin their peaceful expression. In *Horizon Health Center* we held that the Chancery Division, a court of equity, does have the authority to restrict peaceful expressive activity to enforce the public policies of accessibility of medical services and maintenance of medical standards, *id.* at 144-46 (slip op. at 21-24), protection of private property, *id.* at 146-47 (slip op. at 25), and public safety, *id.* at 147 (slip op. at 26).

Here, the Chancery Division entered the injunction against defendants to enforce a public policy favoring the

protection of residential privacy. In Part III, B of this opinion, we conclude that residential privacy represents a sufficient public-policy interest to justify injunctive restrictions and that it implicates a significant government interest. We therefore conclude that the Chancery Division had the power to enjoin the nonviolent, noncriminal activity of defendants to protect plaintiffs' residential privacy.

Decisions of other courts upholding injunctive restrictions against peaceful picketers to protect residential privacy support our conclusion. *See, e.g., Dayton Women's Health Center v. Enix*, 589 *N.E.*2d 121, 127 (Ohio Ct.App.) (affirming permanent injunction against peaceful picketing at residences of abortion-clinic personnel by protestors who had engaged in tortious conduct at clinic itself but not a residences of personnel), *appeal dismissed*, 583 *N.E.*2d 971 (Ohio 1991), *cert. denied sub nom. Sorrell v. Dayton Women's Health Center*, ___ U.S. ___, 112 *S.Ct.* 3033, 120 *L.Ed.*2d 903 (1992); *Klebanoff v. McMonagle*, 552 *A.*2d 677, 678 (Pa.Super. Ct.1988) (upholding injunction against peaceful antiabortion picketers outside residence of physician to protect residential privacy), *appeal denied*, 563 *A.*2d 888 (Pa.1989). *But see Valenzuela v. Aquino*, 853 *S.W.*2d 512, 513-14 (Tex.1993) (finding permanent injunction against selected residential picketing by anti-abortion protestors improper because court had made no determination of legal liability).

Our inquiry does not end with our determination that the Chancery Division had the authority to issue the injunctions, however. For the exercise of the Chancery Division's authority to be valid, the restrictions must

balance defendants' free-speech rights and plaintiffs' residential-privacy interests. *See Horizon Health Center, supra*, 135 *N.J.* 139 (slip op. at 13). The issue is whether the specific restrictions that the Chancery Division imposed are permissible.

III

In *Horizon Health Center* we held that a Chancery Division injunction prohibiting picketing outside an abortion clinic "regulates expressive activity traditionally protected by the First Amendment." 135 *N.J.* at 139 (slip op. at 14). Because the injunctions in these cases regulate the same activity – the *Murray* injunction prohibits "picketing in any form," and the *Boffard* injunction prohibits "gathering, parading, patrolling for the purpose of demonstrating or picketing" – they also regulate First Amendment expression and we must analyze them accordingly.

The injunctions here, restricting expressive activity on public streets and sidewalks in residential neighborhoods, regulate expressive activity in a traditional public forum. In *Horizon Health Center*, we observed that public streets and sidewalks are archetypical traditional public forums. *Id.* at 140 (slip op. at 15). Moreover, as the Supreme Court noted in *Frisby v. Schultz*, 487 *U.S.* 474, 480, 108 *S.Ct.* 2495, 2500, 101 *L.Ed.*2d 420, 429 (1988), "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood."

Therefore, inasmuch as the injunctions proscribe protected activity in a traditional public forum, we evaluate

them under the stringent standards the Supreme Court has outlined for regulating speech in such forums.

> "In these quintessential public for[ums], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. * * * . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."
>
> [*Frisby, supra,* 487 *U.S.* at 481, 108 *S.Ct.* at 2500-01, 101 *L.Ed.*2d at 429 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 *U.S.* 37, 45, 103 *S.Ct.* 948, 955, 74 *L.Ed.*2d 794, 804 (1983).]

The threshold inquiry, then, is whether the injunctions against defendants are content neutral.

A. *Content Neutrality*

A restriction is content neutral if it can be justified without reference to the content of the regulated speech. *Horizon Health Ctr., supra,* 135 *N.J.* at 141 (slip op. at 16). If a restriction is imposed because of a disagreement with the message the regulated speech conveys, however, it is impermissibly content-based. *Ibid.* (slip op. at 16).

We conclude that the injunctions against defendants are content neutral. They do not reflect a disagreement with defendants' respective messages, and we can justify them without reference to the content of defendants'

speech. The final injunctions in both cases do not refer in any way to the content of defendants' speech but merely forbid them from picketing within a certain distance of plaintiffs' residences. The Chancery Division in each case imposed the restrictions not because the court disagreed with defendants' viewpoint but to insure that defendants' communication of that viewpoint does not impermissibly interfere with plaintiffs' residential privacy. In imposing the injunctions, the Chancery Division focused not on the effect of defendants' message on plaintiffs but on defendants' sheer physical presence outside of plaintiffs' homes.

We reject defendants' argument that the injunctions are content based merely because they restrain the expressive activities only of anti-abortion picketers. As we noted in *Horizon Health Center,* "Merely because an injunction restricts only a specified group does not make that injunction content based. Courts always tailor injunctive relief to address the specific facts presented to them." 135 *N.J.* at 143 (slip op. at 20). Only these defendants interfered with plaintiffs' residential privacy. Accordingly, the Chancery Division restrained only the activities of only these defendants.

Defendants also argue that a Chancery Division judge has unbridled discretion in determining whether to issue injunctive relief. Therefore, the argument goes, any injunctive relief a judge issues is content based because that judge may impermissibly consider content in deciding whether to grant relief. To support their argument, defendants cite *Forsyth County, Georgia v. Nationalist Movement,* ___ *U.S.* ___, ___, 112 *S.Ct.* 2395, 2403-04, 120 *L.Ed.*2d 101, 109-10 (1992) (holding ordinance placing

unfettered discretion with county administrator to assess security needs for parade permit fees to be content based). So strained is that analogy, however, that we dwell on the point only long enough to reject it out of hand. The differences between a county administrator's discretion and the discretion imposed in a judicial officer, whose flexibility in the exercise thereof is constrained by well-recognized principles of law, are too obvious to warrant citation of authority.

Finally, the decisions of other courts analyzing similar injunctions against anti-abortion protesters outside doctors' residences support our conclusion that the injunctions are content neutral. See, e.g. *Kaplan v. Prolife Action League*, 431 *S.E.*2d 828, 843 (N.C. Ct.App.) (finding restriction prohibiting picketing within zone near plaintiff's residence content neutral because it "makes no mention of abortion or any other substantive issue. It does not flatly ban picketing * * * nor does it prohibit anti-abortion picketing while permitting residential picketing having other aims. * * * . [T]he trial court [focused not] on the effect * * * of defendants' message * * * , but rather on defendants;' physical presence * * * ") (citations omitted), *review denied*, 436 *S.E.*2d 379 (N.C.1993), *petition for cert. filed*, No. 93-1159 (Jan. 18, 1994); see also *Dayton Women's Health Center, supra*, 589 *N.E.*2d at 127 (finding order prohibiting picketing only in front of certain residences to be content neutral because "[i]t does not prohibit residential anti-abortion picketing while permitting residential picketing having other aims"); *Klebanoff, supra*, 552 *A.*2d at 678-79 (finding injunction prohibiting picketing in front of doctor's house to be content neutral because it does not "refer [ ] to the content or subject

matter of the protest. The injunction contains no invitation to subjective or discriminatory enforcement.").

Having determined that the Chancery Division imposed content-neutral restrictions, we turn now to the question whether those restrictions are narrowly tailored to serve significant government interests and whether they leave open ample alternative channels of communication for defendants. *See Frisby, supra*, 487 *U.S.* 481, 108 *S.Ct.* at 2500-1, 101 *L.Ed.*2d at 429.

B. *Significant Government Interests*

Plaintiffs assert that they are entitled to residential privacy, that defendants' picketing interfered with that privacy, and that the State has a significant interest in protecting their privacy. We agree with plaintiffs and hold that a common-law public policy in favor of protection of residential privacy exists and that that policy implicates a significant government interest justifying the imposition of injunctive restrictions. We therefore need not, and do not, rely on a constitutionally-based residential-privacy right stemming from either the New Jersey or the federal constitutional to justify the imposition of restrictions.

Courts look to a variety of sources, including judicial decisions, to find public policy. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 72 (1980) (stating "The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions"). The decisions of this Court support a conclusion that New Jersey has a public policy in favor of protecting the residential privacy of its citizens.

For example, we have upheld the authority of a municipality to use its zoning power "to secure and maintain 'the blessings of quiet seclusion' and to make available to its inhabitants the refreshment of repose and the tranquility of solitude." *Berger v. State*, 71 *N.J.* 206, 223 (1976) (quoting *Village of Belle Terre v. Boraas*, 416 *U.S.* 1, 9, 94 *S.Ct.* 1536, 1541, 39 *L.Ed.*2d 797, 804 (1974)); see *State v. Baker*, 81 *N.J.* 99, 106 (1979) (same). Moreover, this Court has recognized that the State has an interest in protecting its citizens "against a sense of unease and dangers reasonably to be apprehended on account of strangers filtering through the community." *Borough of Collingswood v. Ringgold*, 66 *N.J.* 350, 357 (1975), *appeal dismissed*, 426 *U.S.* 901, 96 *S.Ct.* 2220, 48 *L.Ed.*2d 826 (1976). Finally, we have noted that even when an intrusion on residential privacy takes the form constitutionally-protected expression, "the right of the [State] to protect its homeowners against * * * untoward invasions of privacy * * * deserves some weight." *Id.* at 369. We find in the cited authorities a public policy favoring the protection of residential privacy. We are convinced as well that enforcement of that policy constitutes a significant government interest.

The United States Supreme Court decision in *Frisby, supra*, supports our conclusion that protection of residential privacy represents a significant government interest. In that case, the Supreme Court upheld against a First Amendment challenge an ordinance forbidding " 'picketing before or about the residence or dwelling of any individual * * * .' " 487 *U.S.* at 477, 108 *S.Ct.* at 2498, 101 *L.Ed.*2d at 426-27 (quoting municipal ordinance). The ordinance itself contained the following statements of purpose: " 'the protection and preservation of the home'

through assurance 'that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.' " *Id.* at 477, 108 *S.Ct.* at 2498, 101 *L.Ed.*2d at 427 (quoting municipal ordinance).

The Supreme Court found that the protection of residential privacy is a significant government interest. *Id.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431. Although failing to identify the source of the State's interest, the Court reasoned that " '[t]he State's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order.' " *Ibid.* (quoting *Carey v. Brown*, 447 *U.S.* 455, 471, 100 *S.Ct.* 2286, 2296, 65 *L.Ed.*2d 263, 276 (1980)). The Court described the home as " 'the last citadel of the tired, the weary, and the sick,' " *ibid.* quoting *Gregory v. Chicago*, 394 *U.S.* 111, 126, 89 *S.Ct.* 946, 953, 22 *L.Ed.*2d 134, 144 (1969) (Black, J., concurring)), concluding that " 'preserving the sanctity of the home * * * is surely an important value.' " *Ibid.* (quoting *Carey, supra*, 447 *U.S.* at 471, 100 *S.Ct.* at 2295, 65 *L.Ed.*2d at 276)).

The Supreme Court also pointed out that "protection of the unwilling listener" is an important component of residential privacy because citizens can become captive listeners in their own homes. *Id.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431; *see also* Hazel A. Landwehr, Note, *Unfriendly Persuasion: Enjoining Residential Picketing*, 43 Duke L.J. 148, 158 (1993) (noting that State's "ability to control the flow of ideas into the home is based not only on a concern for preserving the sanctity of the home but also on a recognition that homeowners present a captive audience for speakers"). The Supreme Court concluded that "a special benefit of the privacy all citizens enjoy

within their own walls, which the Sate may legislate to protect, is an ability to avoid intrusions." *Id.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 432.

In sum, we conclude that New Jersey has a common-law public policy in favor of protecting residential privacy and that enforcement of that policy constitutes a significant government interest. We therefore accept the reasoning of the Appellate Division to the extent that it based its justification of the restrictions against defendants on common-law notions.

Because common-law public policy alone suffices to justify imposing restrictions on defendants, we decline to decide whether article 1, paragraph 1 of the New Jersey Constitution provides a basis for injunctive relief. *See O'Keefe v. Passaic Valley Water Comm'n*, 132 *N.J.* 234, 240-41 (1993) (noting that courts should not decide constitutional questions unless necessary to dispose of litigation). Thus, to the extent the Appellate Division may have relied on the New Jersey Constitution to impose restrictions on defendants, *see Murray, supra*, 264 *N.J.Super.* at 30-31, we do not adopt that court's reasoning.

Similarly, we do not base our decision in respect of the injunctions on a federal constitutional right to residential privacy. First, we need not reach that constitutional issue inasmuch as we can decide the cases before us on common-law principles. *See O'Keefe, supra*, 132 *N.J.* at 240-41. Second, in upholding the injunctions, the Appellate Division did not appear to rely on any federal constitutional right to residential privacy. Third, no such federal right to residential privacy appears to exist: although the Supreme Court justified an ordinance

against selected residential picketing on the protection of residential privacy, *Frisby, supra*, 487 *U.S.* at 484-85, 108 *S.Ct.* at 2502-03, 101 *L.Ed.*2d at 431-32, the Court did not establish explicitly a federal constitutional right to residential privacy. Moreover, even if the Supreme Court had established such a right, the State could not protect that right against private interference. *See Bray v. Alexandria Women's Health Clinic*, ___ *U.S.* ___, ___, 113 *S.Ct.* 753, 771, 122 *L.Ed.*2d 34, 52 (1993) (noting that general federal constitutional right of privacy is not protected against private interference).

We therefore come to the question whether the specific restrictions imposed are narrowly tailored to serve the significant government interest in protection of residential privacy. That inquiry requires us to balance defendants' constitutional right of free expression against plaintiffs' common-law interest in residential privacy. *See Crowe v. Di Gioia*, 90 *N.J.* 126, 134 (1982) (outlining requirements to issue injunctive relief); *cf. In re Farber*, 78 *N.J.* 259, 268 (noting balance between non-constitutional interest of press in protecting confidentiality of sources and criminal defendant's constitutional right to fair trial), *cert. denied*, 439 *U.S.* 997, 99 *S.Ct.* 598, 58 *L.Ed.*2d 670 (1978).

C. *Narrow Tailoring*

A regulation is narrowly tailored if it promotes a significant government interest that the government could not achieve as effectively without the regulation. *Horizon Health Ctr., supra*, 135 *N.J.* at 148 (slip op. at 26). "Yet, a regulation may not 'burden substantially more

speech than is necessary to further government's legitimate interests.' " *Id.* at 148 (slip op. at 27) (quoting *Ward v. Rock Against Racism*, 491 *U.S.* 781, 799, 109 *S.Ct.* 2746, 2758, 105 *L.Ed.*2d 661, 680 (1989)).

1. *Murray v. Lawson*

The *Murray* injunction is a "place" injunction that prohibits defendants "from picketing-in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence * * * ." 264 *N.J.Super.* at 26. We conclude that that restriction meets the requirements for narrow tailoring of a "place" restriction.

In *Frisby, supra*, the Supreme Court found narrowly tailored a municipal ordinance prohibiting " 'picketing before or about the residence or dwelling of any individual * * * ." ' 487 *U.S.* at 477, 108 *S.Ct.* at 2498, 101 *L.Ed.*2d at 426-27 (quoting the ordinance). The Supreme Court reasoned that

> the picketing [prohibited by the ordinance] is narrowly directed at the household, not at the public. The type of picketers banned * * * do not seek to disseminate a message to the general public, but to intrude upon the targeted resident * * * . Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy.
>
> [*Id.* at 486, 108 *S.Ct.* at 2503, 101 *L.Ed.*2d at 433.]

The Court noted further that the First Amendment permits restrictions to protect the captive listener and that the target of focused residential picketing is indeed "captive" because "[t]he resident is figuratively, and perhaps literally, trapped within the home, and because * * * [the resident] is left with no ready means of avoiding the unwanted speech." *Id.* at 487, 108 *S.Ct.* at 2504, 101 *L. Ed.* 2d at 433. Accordingly, the Court concluded that a complete ban of focused residential picketing is narrowly drawn to serve the interest of protection of residential privacy. *Id.* at 487-88, 108 *S. Ct.* at 2504, 101 *L. Ed.* 2d at 434.

Moreover, the decisions of other courts, upholding total bans on focused picketing within a certain distance of a target's residence, support a conclusion that a 300-foot ban restriction on picketing is permissible. See, *e.g., Northeast Women's Center v. McMonagle*, 393 *F.*2d 57, 67 (3d Cir. 1993) (imposing 500-foot restriction on anti-abortion picketers outside residences of clinic staff and remanding to determine if circumstances require even greater restriction); *State v. Castellano*, 506 *N.W.*2d 641, 647 (Minn. Ct. App. 1993) (finding ordinance prohibiting picketing "focused on or taking place in front of a particular single residential dwelling" to be narrowly tailored); *Kaplan, supra*, 431 *S.E.*2d at 844-47 (finding 300-foot restriction against residential anti-abortion protestors [sic] to be narrowly drawn); *Dayton Women's Health Center, supra*, 589 *N.E.*2d at 127 (upholding ban on picketing "within viewing distance" of residences of abortion-clinic patients and staff); *Klebanoff, supra*, 552 *A.*2d at 680-81 (finding permanent injunction prohibiting anti-abortion protestors from

picketing directly in front of doctor's house to be narrowly tailored). *But see Ramsey v. Edgepark, Inc.*, 583 *N.E.*2d 443, 452 (Ohio Ct. App.) (reversing 200-yard zone of protection, finding that picketers "have a right to picket in the neighborhood, block or street where [targets of picket] live"), *appeal dismissed*, 560 *N.E.*2d 780 (Ohio 1990).

We are satisfied that the 300-foot restriction against defendants is narrowly tailored to protect plaintiffs' residential privacy. Defendants directed their picketing activity toward plaintiffs and not toward the public. Defendants' demonstration spanned a length of approximately ten houses, but plaintiffs' house was never free from picketers during the protest. Even if some defendants did have a broader communicative purpose, their activity inherently and offensively intruded on plaintiffs' residential privacy. Of particular concern to the Chancery Division was the effect of the picketing on plaintiffs' three children: the trial court determined that plaintiffs had become captive listeners within their own home, a circumstance that required a total ban on picketing. We agree.

Nor will we disturb the Chancery Division's finding that the spatial scope of the total ban should be 300 feet. The record discloses that one of the demonstrators trespassed on a neighbor's lawn, that other children live in the neighborhood, and that a demonstrator warned a young neighborhood boy that a killer lived in the neighborhood. The Chancery Division made specific findings, from which it concluded that a 300-foot restriction was appropriate. "While the court could possibly achieve its goal with a narrower [speech-] free zone, we decline to

entertain quibbling over a few feet." *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 *F.*2d 681, 686 (9th Cir. 1988). We likewise will not disturb the Chancery Division's imposition of a 300-foot zone.

2. *Boffard v. Barnes*

The *Boffard* injunction prohibits defendants "[f]rom gathering, parading, patrolling for the purpose of demonstrating or picketing *within the immediate vicinity of* plaintiffs' residence * * * ." 264 *N.J. Super.* at 13 (emphasis added). For the same reasons that we find a complete ban on focused residential picketing permissible in *Murray*, we find that a complete ban on picketing outside the Boffard residence is permissible as well. However, because we conclude that the Chancery Division could have more precisely defined the spatial scope of its ban, we remand to that court.

Injunctions are supposed to "be specific in terms; [and] describe in reasonable detail * * * the act or acts sought to be restrained * * * ." *R.* 4:52-4. The description "within the immediate vicinity of" contained in the *Boffard* injunction is neither specific nor reasonably detailed. Although defendants do not argue that the restriction is unconstitutionally vague, we are sure that neither the parties nor the police can determine with any certainty how close to plaintiffs' residence "within the immediate vicinity of" can legitimately take one. We could limit that language to preclude picketing "before or about the residence or dwelling of" plaintiffs – a restriction that the Supreme Court upheld in *Frisby, supra*, 487 *U.S.* at 482, 108 *S.Ct.* at 2501, 101 *L. Ed.* 2d at 430, by

interpreting it to "prohibit only picketing focused on, and taking place in front of, a particular residence." But "within the immediate vicinity of" seems to prohibit more than picketing only "in front of" plaintiffs' residence. "Vicinity" means "a surrounding area or district: locality, neighborhood," *Webster's Third New International Dictionary*, 2550 (1971), and "immediate" means "characterized by contiguity: existing without intervening space or substance: being near or at hand: not far apart or distant." *Id.* at 1129.

Thus, because "within the immediate vicinity of" does not describe sufficiently the area in which the injunction's prohibition applies, we remand to the Chancery Division to set forth more precisely the scope of the ban. When imposing the "within the immediate vicinity of" restriction, the Chancery Division may have had a particular area in mind. If so, the court could easily clarify that restriction. We recognize, however, that if it is to impose a more specific restriction, the Chancery Division may have to make additional findings. We are mindful as well that the Chancery Division has great flexibility in defining the scope of the ban; the court could, for example, preclude picketing on plaintiffs' street, or could prohibit that activity within a specific number of feet from, within sight distance of, or in front of plaintiffs's residence. We leave that determination to the Chancery Division.

D. *Alternative Channels of Communication*

We are convinced that the *Murray* injunction and the *Boffard* injunction, which, on modification, will prohibit picketing within a certain distance from plaintiffs' residence, leave open ample alternative channels of communication for these defendants. Defendants may communicate their message to the physicians, to the physicians' families, and to the physicians' neighbors on any residential street beyond the zone the injunctions establish. They may also picket and protest outside the physicians' offices and outside the clinics and hospitals where the physicians perform medical procedures. Although defendants may not picket within the zones the injunctions establish, they have ample other opportunities to express their message to their target audience.

IV

Defendants in *Boffard* claim that the permanent injunction against them also violates their right of free expression under article I, paragraph 6 of the New Jersey Constitution. That provision provides in pertinent part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." For the same reasons that we decided not to analyze *Horizon Health Center, supra*, under the New Jersey Constitution, we similarly decline to analyze *Boffard* under our State Constitution. See 135 *N.J.* at 154 (slip op at 35-36). Thus, we confine our discussion to those First Amendment principles we have outlined already.

V

In *Murray v. Lawson* we affirm the judgment of the Appellate Division.

In *Boffard v. Barnes* we modify the judgment of the Appellate Division. The cause is remanded to the Chancery Division for further proceedings consistent with this opinion. As so modified the judgment is affirmed.

Chief Justice Wilentz and Justices Handler, Pollock, O'Hern, Garibaldi, and Stein join in this opinion.

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624 A.2d 3

BELINDA MURRAY AND ELRICK A. MURRAY, M.D., PLAINTIFFS-RESPONDENTS, v. MICHAEL ANDREW LAWSON, DAVID CRIST, JANE DOE (A FICTITIOUS NAME) AND JOHN DOE (A FICTITIOUS NAME), DEFENDANTS-APPELLANTS.

Superior Court of New Jersey
Appellate Division

Submitted February 18, 1993 –
Decided April 12, 1993

Before Judges **KING, BRODY** and **LANDAU**.

Richard F. Collier, Jr., attorney for appellants (*Mr. Collier,* on the brief).

Pamela Mandel, attorney for respondents (*Ms. Mandel,* on the brief).

The opinion of the court was delivered by

KING, P.J.A.D.

In this case plaintiffs sought damages and injunctive relief against defendants for picketing in an harassing manner in front of their home in Westfield on January 20, 1991. Plaintiff Elrick A. Murray, M.D., is a physician who performs abortions. Defendants are anti-abortionists. The Chancery Division judge dismissed the damages claim but entered a permanent injunction against pickets or demonstrations by defendants and their cohorts within 300 feet of plaintiffs' residence. Defendants appeal from the injunctive order. We affirm.

I

The verified complaint filed in February 1991, by Dr. Murray and his wife against Michael Andrew Lawson, David Crist, and the fictitiously-named defendants, alleged: (1) trespass, (2) disruption of use and enjoyment of property, (3) intrusion on seclusion, (4) damage to Dr. Murray's professional reputation and pecuniary interests, and (5) deprivation of the right to privacy guaranteed by the federal and State constitutions. After a hearing on February 14, 1991 Judge Boyle entered a temporary order sharply restricting picketing near plaintiffs' home.[1]

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[1] The temporary order of February 22, 1991 stated:

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from using the word killer or murderer or from referring to Dr. Murray and members of his family by name. This restriction applies to both the spoken and the written word; and it is further [ordered:]

1. Defendant may picket for not more than one (1) hour every third week commencing the week of February 18, 1991. There is to be no picketing until that time;

2. That no more than two (2) demonstrators may be present at the plaintiffs' residence until further Order of the Court.

3. Should any additional demonstrator be present in the adjacent area to the plaintiffs' residence, they may not congregate near the plaintiffs' house but must walk throughout the entire neighborhood to include at least the distance to Central Avenue;

4. The sign which was present on January 20, 1991 of the decapitated person which purported to be a fetus is prohibited and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combination with them be enjoined and restrained from hand delivering written material to the plaintiffs or their neighbors. . . .

Defendants removed the case to federal court in February 26, 1991. Federal Judge Barry returned the matter to State court because of lack of federal jurisdiction. We then denied defendants' request for interlocutory review on April 26, 1991.

Judge Boyle held a final hearing on May 21, 31 and July 25, 1991. He dismissed the damages claims but on July 26, 1991 permanently enjoined picketing within 300 feet of plaintiffs' residence.

II

The final hearing presented this factual picture. Dr. Murray is an obstetrician and gynecologist with a private practice in Plainfield. He also serves at several area clinics, including the Women's Medical Center in Howell, where he and other doctors perform abortions. He does not perform abortions at his Plainfield office. He lives in a typical suburban residential neighborhood in Westfield. He maintains no office and treats no patients there. He lives there with his wife, plaintiff Belinda Murray, and three children, who in 1991 were age six, eleven and fifteen. Defendants, who live near the Howell Clinic, regularly demonstrated against abortion by picketing at the Howell Clinic for about two years before January 1991.

Defendant Lawson discovered the Plainfield and Westfield addresses of Dr. Murray. He visited the Westfield home address on about December 14, 1990 and was surprised to see a residence rather than an office. He rang the doorbell, which was answered by plaintiffs' son, then

age fourteen, and on confirming it was the Murray residence, told the lad to tell his father to stop doing abortions. Mrs. Murray then appeared at the door and told Lawson not to talk to her children, to leave and not to come back. He immediately left. Mrs. Murray was upset and frightened by this visit.

Defendants then planned a demonstration at the Murray residence for January 20, 1991, a Sunday. On January 18 Lawson informed the Westfield police that a peaceful protest picket was planned by about fifty people. In the afternoon of January 20 two policemen met the fifty-seven picketers at the nearby Edison School, instructed them on basic picketing rules, and escorted them to the sidewalk in front of plaintiffs' house and about ten surrounding homes. They walked in a single-file loop on the sidewalk past plaintiffs' house, usually two abreast but sometimes four or five abreast.

Dr. Murray had been warned of the impending demonstration by the administrator of the Medical Care Center in Woodbridge, another clinic where he served. Westfield police had confirmed this and advised Dr. Murray to send his family away for the day and remain inside the house himself. Mrs. Murray and the children spent the day at her sister's home. Dr. Murray observed the pickets from his windows. He heard singing, shouting and chanting; he saw several neighbors, including two teenage boys, converse with the picketers. One of the boys videotaped a short portion, in which picketers loudly questioned whether the boy knew there was a killer in the neighborhood. Picketers carried placards describing Dr. Murray as: a vagabond abortionist, a killer of unborn babies who scars women, and child murderer.

One sign stated that if Dr. Murray got out of Howell, the picketers would get out of Westfield. Another placard showed a decapitated infant labeled "Elrick Murray, abortionist."

The plaintiffs said the demonstration deprived them of their usual Sunday family time and threatened Dr. Murray's practice by forcing him to remain home out of fear for his property while two of his patients were in labor. Since the picketing, Mrs. Murray has been nervous and depressed; Dr. Murray has felt compelled to curtail his professional work so he can be at home more often.

In response to the January 20 demonstration, plaintiffs filed this suit. On the day of the first scheduled hearing date, February 8, defendants Lawson and Crist picketed on the sidewalk in front of plaintiffs' residence, and along the block, for about fifteen minutes.

On February 26 defendants removed the case to federal district court based on the assertion of a federal constitutional claim of deprivation of privacy rights. After several motions in that court, Federal Judge Barry remanded to State court for lack of federal jurisdiction on April 24, 1991. Jurisdiction was declined when Judge Barry dismissed that portion of count five alleging violation of a right to privacy guaranteed by the United States Constitution because the requisite state action was absent. She found that, because of *Fed.R.Civ.P.* 65(b), Judge Boyle's temporary restraining order had expired on March 12, 1991, ten days after the February 26 removal. On April 26, 1991 Judge Boyle reimposed the earlier temporary restraints.

There was no further residential picketing until May 4, 1991. In the interim, Dr. Murray's apprehension about the conduct of anti-abortionists heightened. On April 22 Dr. Murray discovered, on arriving at work at the Medical Care Center in Woodbridge, that the building had been burned. The police chief and fire marshall attributed the fire to arson. Sometime between April 22 and May 4 Lawson picketed at the Howell clinic, and later that same day picketed at Dr. Murray's Plainfield office. On May 2 the Howell police received a telephone bomb threat to the Howell clinic.

On the morning of May 4 Lawson and Edith Tucker began to picket in front of Plaintiffs' home. Dr. Murray was annoyed by the timing, both because this came on the heels of the Woodbridge clinic arson and because he had misinterpreted the preliminary injunction to mean that defendants could picket only the third week of every month, as opposed to every three weeks. He called the police, who reminded him of the injunction permitting such picketing and came to the scene. After the police arrived, Dr. Murray went out to confront Lawson, expressed certain "expletives," and asked why he was there. Lawson replied that he would continue to come to the doctor's home as long as the doctor continued to go to the Howell clinic.

According to Dr. Murray, he returned to his house at the urging of police, who told him shortly afterwards that the picketers' hour was up. This was in error; the picketers actually had a few minutes left before their hour was up. Dr. Murray rushed out and "took a swing" at Lawson, but a police officer reacted quickly to intercept it. Dr. Murray and a neighbor also attempted to remove a sign

strapped to Tucker. Although Dr. Murray had no proof linking defendants with the arson or bomb threat, he was scared by those events; he found defendants' presence threatening, and feared the demonstrators and their colleagues.

According to Lawson, Dr. Murray talked to him for about ten minutes before the police arrived, and also yelled, cursed and told him to leave. He grabbed and tore Lawson's "Stop Abortion Now" sign. After police arrived, one officer ushered Dr. Murray away from the picketers. When Dr. Murray returned to the sidewalk accompanied by an officer, Lawson felt a punch to the back of his head. After picketing a bit longer, Lawson told the police that he wanted Dr. Murray arrested, and was advised to file a complaint. He later did so and Dr. Murray was convicted of simple assault in the Westfield Municipal Court and fined $100.

At the conclusion of the February 14, 1991 plenary hearing, Judge Boyle enjoined defendants from picketing within 300 feet of plaintiffs' residence. He dismissed the claim for interference with Dr. Murray's profession, which he interpreted as a claim for interference with contractual relations, based on lack of evidence of the required malice or intent. He subsumed the claim for interference with use and enjoyment of the home under the claim for tortious invasion of privacy. He found the December 14, 1990 trespass by defendant Lawson to have occurred "before this case was instituted," presumably meaning that it was not relevant to the picketing. He characterized plaintiffs' common-law tort claims as an invasion of privacy and intentional infliction of emotional distress. He found insufficient evidence to justify money

damages for either. Plaintiffs do not cross-appeal from these adjudications.

Judge Boyle found that plaintiffs had a privacy interest in their home, independent of any tort claim, and that a court of equity could intervene to protect that right even if no legal remedy for tort damages was available. He engaged in a balancing test between plaintiffs' privacy interest and defendants' First Amendment rights. He found that under *Frisby v. Schultz*, 487 *U.S.* 474, 108 *S.Ct.* 2495, 101 *L.Ed.*2d 420 (1988), targeted or focused residential picketing was subject to judicial regulation, even absent trespass or disturbance of the peace. He found the *Frisby* analysis appropriate even though in that case an ordinance, rather than an injunction, was challenged and upheld.

The judge dissolved the prior temporary injunction and ordered "that the defendants and all persons in active concert or participation with them be enjoined and restrained from picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence at . . . Westfield, New Jersey. . . . "

Defendants contend on this appeal that the injunction: (1) violates the separation of powers doctrine, (2) was an unconstitutional prior restraint, (3) violated defendants' free speech rights, and (4) was unwarranted because Dr. Murray came to the court of equity with "unclean hands."

III

Defendants first contend that the judge had no power to issue an injunction absent a finding that they had committed a crime or tort. Plaintiffs respond that the judge had inherent equitable power to enforce a right to residential privacy as recognized by the United States Supreme Court in *Frisby, supra*, 487 *U.S.* 474, 108 *S.Ct.* 2495, 101 *L.Ed.*2d 420. We agree with plaintiffs.

Substantive law-making belongs in the legislative domain, *State v. Leonardis*, 73 *N.J.* 360, 369, 374, 375 *A.*2d 607 (1977), and the judicial branch of government is constitutionally prohibited from exercising powers properly belonging to another branch. *N.J. Const.* art. III, ¶ 1.[2] Under their concept of the doctrine of separation of powers, defendants assert that no legal right worthy of judicial protection was established and that there can be no equitable remedy without proof of "legal liability."

The irreparable harm necessary for equitable relief frequently is identified by the inadequacy of money damages. *Crowe v. De Gioia*, 90 *N.J.* 126, 133, 447 *A.*2d 173 (1982). Nonetheless, defendants insist that their peaceful, residentially-focused picketing cannot be enjoined because they violated no positive laws and committed no civil wrongs and because the court of equity lacks power to enjoin conduct subject to neither criminal nor civil

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[2] *N.J. Const.* art. III, ¶ 1 states:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

penalty. We reject this as too crabbed a view of the scope of equitable relief in this circumstance.

Equity follows the law, and ordinarily equity will not divest legal rights. *Dunkin' Donuts of America, Inc. v. Middletown Donut Corp.* 100 *N.J.* 166, 183-84, 495 *A.*2d 66 (1985). However, equity is sometimes obliged to acknowledge rights not recognized at law, and "equity will never suffer a wrong without a remedy." *Orland Properties, Inc. v. Broderick,* 94 *N.J.Super.* 307, 313-14, 228 *A.*2d 95 (Ch.Div.1967).

Defendants contend not only that plaintiffs had no protectable right, but also that any remedy in favor of plaintiffs, deprives them of their constitutional right to free expression. Defendants also rely on the Supremacy Clause, contending that First Amendment rights must perforce outweigh any State constitutional right to privacy asserted by plaintiffs. We agree that the validity of the injunction depends on the balancing of First Amendment considerations.

We perceive no separation of powers problem here arising from the Chancery judge's exercise of inherent equitable power. Contrary to defendants' contention, Judge Boyle did not "roam around righting 'wrongs' at will," but granted equitable relief to vindicate a right to residential privacy in a context explicitly recognized by the United States Supreme Court in *Frisby, supra,* 487 *U.S.* 474 108 *S.Ct.* 2495, 101 *L.Ed.*2d 420.

In *Frisby,* Justice O'Connor described a right to avoid being an unwilling, or "captive" listener in one's own home. *Id.* at 484-85, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at

431-32. The right is not described by her as a constitutional right to be protected against state action only, but as a personal right to residential privacy in whose protection there is a *significant* governmental interest. *Ibid.* Based on the right to residential privacy described in *Frisby,* we recently upheld restraints against peaceful union picketing at the residence of the president of a corporation. *K-T Marine, Inc. v. Dockbuilders Local Union 1456,* 251 *N.J.Super.* 153, 597 *A.*2d 563 (Ch.Div.1990), *aff'd,* 251 *N.J.Super.* 107, 597 *A.*2d 540 (App.Div.1991). The president-homeowner did not allege trespass or disruptive behavior; he only alleged that his family was made apprehensive. The Third Circuit also recently upheld restraints based on so-called *Frisby* rights, enjoining picketing within 500 feet of the residence of an abortion clinic employee. *Northeast Women's Ctr., Inc. v. McMonagle,* 939 *F.*2d 57, 65 (3d Cir.1991). The restriction on home picketing was found reasonable in light of prior demonstrations considered harassment by the court, which had resulted in resignations of two intimidated employees, a blocked driveway preventing an employee from going to work, and frightened children. That injunction restrained not only harassment or trespass, but all picketing at employees' homes, even peaceful, otherwise legal, picketing.

In *Frisby,* the United States Supreme Court upheld a Bloomfield, Wisconsin ordinance that banned picketing "before or about" any residence. The Court construed "the ban to be limited one; only focused picketing taking place solely in front of a particular residence is prohibited." 487 *U.S.* at 483, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 431. The Court relied on the exercise of the general police

power by state and local government rather than on any federal constitutional right to privacy. The Court found that the enforcement of the Brookfield, Wisconsin ordinance preserved ample alternative channels of communication to the anti-abortion activities while it served "a significant government interest": "the protection of residential privacy." *Id.* at 484, 108 *S.Ct.* at 2502, 101 *L.Ed.* at 431.

Defendants urge us to hold, under the guise of obeisance to the doctrine of separation of powers, that only a municipal ordinance, or some form of positive law, can protect this right of residential privacy – that a court of equity has no such power absent a local ordinance. Defendants urge that if a court of equity so acts in the absence of a local ordinance, it becomes akin to the odious court of Star Chamber or the Inquisition. We reject the contention.

We conclude that a court of equity has inherent power to protect this significant right to residential privacy, under either State or federal concepts of the police power, even if the absence of a local ordinance. Justice O'Connor reviewed at length the judicial history of the protection of residential privacy in *Frisby* and we burden this opinion with her very pertinent observations:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 *U.S.* [455] at 471, 65 *L.Ed.*2d 263, 100 *S.Ct.* 2286 [2296 (1980)]. Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," *Gregory v.*

> *Chicago*, 394 *U.S.* 111, 125, 22 *L.Ed.* 2d 134, 89 *S.Ct.* 946 [953] (1969) (Black, J., concurring), and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey, supra,* [447 *U.S.*] at 471, 65, *L.Ed.* 2d 263, 100 *S.Ct.* 2286 [2296].
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> One important aspect of residential privacy is protection of the unwilling listener. Although in may locations, we expect individuals simply to avoid speech they do not want to hear, *cf., Erznoznik v. City of Jacksonville, supra,* [422 *U.S.* 205] at 210-211, 45 *L.Ed.* 2d 125, 95 *S.Ct.* 2268 [2273 (1975)]; *Cohen v. California*, 403 *U.S.* 15, 21-22, 29 *L.Ed.* 2d 284, 91 *S.Ct.* 1780 [1786] (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan v. Post Office Dept*, 397 *U.S.* 728, 738, 25 *L.Ed.* 2d 736, 90 *S.Ct.* 1484 [1491] (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. [487 *U.S.* at 484-85, 108 *S.Ct.* at 2502, 101 *L.Ed.* 2d at 431-32.]
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> Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude

> upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity, nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt. . . . [487 *U.S.* at 486, 108 *S.Ct.* at 2503, 101 *L.Ed.* 2d at 433.]

As Justice O'Connor observed, "The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech." *Id.* at 487, 108 *S.Ct.* at 2504, 101 *L.Ed.*2d at 433.

We also stress on this point that our State Supreme Court has recognized a State constitutional right of privacy under Article I, paragraph 1 of the New Jersey Constitution.[3] *Hennessey v. Coastal Eagle Point Oil Co.*, 129 *N.J.* 81, 95-96, 609 *A.*2d 11 (1992). This right has been recognized in many contexts, including: marital and familial association, refusal of medical treatment, consensual adult sexual relations, disclosure of personal information, and procreative rights. *Id.* at 96, 609 *A.*2d 11. *See* Robert F. Williams, *The New Jersey State Constitution* 30-31 (1990). The right to residential privacy is similarly inherent in human concerns. The State right to privacy has

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[3] *N.J.Const.* art. I, ¶ 1 states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

been called the common-law right to solitude or seclusion in private affairs. *Hennessey, supra,* 129 *N.J.* at 94-95, 609 *A.*2d 11. We reject the notion that courts are powerless to protect residential privacy simply because there is no local ordinance regulating focused or targeted residential picketing. "It has been recognized that the State Constitution, as a well spring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation." *State v. Schmid,* 84 *N.J.* 535, 559, 423 *A.*2d 615 (1980), *appeal dismissed,* 455 *U.S.* 100, 102 *S.Ct.* 867, 70 *L.Ed.*2d 855 (1982). We uphold the power of the court of equity to act in these circumstances.

IV

We next consider defendants' claim that the injunction is both a prior or unreasonable restraint in violation of their First Amendment rights of speech and expression. Plaintiffs claim that the injunction is a valid restraint because it: (1) is a content-neutral time, place and manner restriction, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels of communication. We agree with plaintiffs.

The First Amendment to the United States Constitution provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech. . . . " Picketing plainly involves expressive conduct within its protection. *Police Dep't v. Mosley,* 408 *U.S.* 92, 99, 92 *S.Ct.* 2286, 2292, 33 *L.Ed.*2d 212, 218 (1972); *Pebble Brook, Inc. v. Smith,* 140 *N.J.Super,* 273, 276, 356 *A.*2d 48 (Ch.Div.1976).

Public streets and sidewalks in residential neighborhoods are traditional public forum. *Carey v. Brown*, 447 *U.S.* 455, 460, 100 *S.Ct.* 2286, 2290, 65 *L.Ed.*2d 264, 269 (1980). In a public forum, government restrictions on speech-related activity such as picketing are subject to careful scrutiny. *Id.* at 461-62, 100 *S.Ct.* at 2291, 65 *L.Ed.*2d at 270. This contrasts with non-public fora, where speech restrictions must satisfy only a reasonableness standard. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 *U.S.*, ___, ___, 112 *S.Ct.* 2701, 2706, 120 *L.Ed.*2d 541, 550 (1992).

Under the First Amendment, applicable to states through the Fourteenth Amendment, government may not prohibit all communicative activity in a public forum. *Horizon Health Center v. Felicissimo*, 263 *N.J.Super.* 200, 622 *A.*2d 891 (App.Div.1993); *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 *U.S.* 37, 45, 103 *S.Ct.* 948, 955, 74 *L.Ed.*2d 794, 804 (1983). Content-based restrictions are permitted only where necessary to serve a compelling state interest and where narrowly drawn to achieve that end. *Ibid.* Content-neutral regulations of time, place and manner of expression are permitted only if they are narrowly tailored to serve a significant government interest and if they leave open ample alternative channels of communication. *Ibid.*

Hence, peaceful picketing is protected by the First Amendment. *Thornhill v. Alabama*, 310 *U.S.* 88, 104, 60 *S.Ct.* 736, 745, 84 *L.Ed.* 1093, 1103 (1940). However, peaceful residential picketing is not "beyond the reach of uniform and nondiscriminatory regulation." *Carey v. Brown, supra*, 447 *U.S.* at 470, 100 *S.Ct.* at 2295, 65 *L.Ed.*2d at 275. Moreover, as we have seen, the state may regulate "to

protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected . . . for homes. . . . " *Id.* at 470-71, 100 *S.Ct.* at 2295, 65 *L.Ed.*2d at 276 (quoting *Gregory v. Chicago*, 394 *U.S.* 111, 118, 89 *S.Ct.* 946, 950, 22 *L.Ed.*2d 134, 140 (1969) (Black, J., concurring)). As discussed in point III, the United States Supreme Court, in *Frisby*, found valid a Brookfield, Wisconsin ordinance banning all residential picketing. The ordinance stated: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Frisby, supra*, 487 *U.S.* at 477, 108 *S.Ct.* at 2498, 101 *L.Ed.*2d at 426-27. The ordinance was enacted in response to peaceful picketing at the home of a doctor who performed abortions at clinics in neighboring towns. The Court construed the ordinance to prohibit not all picketing in residential areas, but only picketing focused on and taking place in front of a particular residence, thus preserving ample alternative channels of communication, even within the same residential neighborhood. *Id.* at 482-84, 108 *S.Ct.* at 2501-02, 101 *L.Ed.*2d at 430-31.

The Court found the ordinance narrowly tailored to protect unwilling recipients of the communications because it targeted no more than the problem it sought to remedy. *Id.* at 485, 108 *S.Ct.* at 2502, 101 *L.Ed.*2d at 432. The ordinance banned picketing directed not to the public, but to a specific household, and the ban of the resulting intrusion was permissible even if the picketers had a broader communicative purpose. *Id.* at 486, 108 *S.Ct.* at 2503, 101 *L.Ed.*2d at 433. The Court found picketing outside a residence, whatever the size of the group, unquestionably offensive and disturbing. *Id.* at 487, 108 *S.Ct.* at

2504, 101 *L.Ed.*2d at 433. The problem, the unavoidable presence of an unwelcome visitor at the home, is created by the medium of expression itself, the picketing. *Ibid.* 487 *U.S.* at 488, 108 *S.Ct.* at 2505, 101 *L.Ed.*2d at 434.

The injunction in the case before us must be subjected to the same analysis. The injunction here is facially content-neutral. Nevertheless, an injunction is necessarily directed to a particular class of speakers. Defendants argue it is therefore both content-specific and viewpoint-specific. The Third Circuit recently rejected this argument, explaining that limitation of the restraint to those who had already picketed did not create a focus on content, but rather reflected a tailoring of the remedy to its legitimate purpose. Northeast Women's Ctr. Inc. v. McMonagle, supra, 939 *F.*2d 57; *Id.* at 62-63, 66. We agree. *Horizon Health Center, supra,* 263 *N.J.Super.* at 214, 622 *A.*2d 891.

Content-based or viewpoint restrictions on speech are presumptively invalid. *R.A.V. v. City of St. Paul,* 505 *U.S.* ___, ___, 112 *S.Ct.* 2538, 2542-43, 120 *L.Ed.*2d 305, 317 (1992). They are almost always impermissible in a public forum. *Police Dep't v. Mosley, supra,* 408 *U.S.* at 96, 92 *S.Ct.* at 2290, 33 *L.Ed.*2d at 217. Residential privacy is not such a compelling interest that it will permit content-based restrictions. *Carey v. Brown, supra,* 447 *U.S.* at 465, 100 *S.Ct.* at 2292, 65 *L.Ed.*2d at 272. However, incidentally differential treatment of speech based on content is permitted where the injunctive relief targets conduct based on an activity other than its expressive content. *R.A.V. v. City of St. Paul, supra,* 505 *U.S.* at ___, 112 *S.Ct.* at 2546-47, 120 *L.Ed.*2d at 321-22.

A Texas appellate court recently relied on *Frisby* when concluding that an injunction, which prohibited picketing within 400 feet of a physician's residence by anti-abortion protestors [sic], conformed to First Amendment standards. *Vallenzuela v. Aquino,* 800 *S.W.*2d 301 (Tex.Ct.App.1990), error granted, May 1, 1991. The Texas court found no violation of the content-neutrality requirement because the injunction was directed to and proscribed the secondary effects of the picketing, not the content of the speech. *Id.* at 305. The court noted that a regulation may satisfy content-neutral review standards, despite a discriminatory impact on content, as long as its purpose was content-neutral. *Ibid.* (citing *City of Renton v. Playtime Theaters, Inc.,* 475 *U.S.* 41, 48-49, 106 *S.Ct.* 925, 89 *L.Ed.*2d 29, 38-39 (1986) (prohibition of adult movie theaters within 1,000 feet of residential property held content-neutral where purpose to protect residences from secondary effects of such theaters)); *see Medlin v. Palmer,* 874 *F.*2d 1085, 1090 (5th Cir.1989) (ordinance prohibiting loudspeaker within 150 feet of abortion clinic held content-neutral despite practical effect of limiting publication of anti-abortionists' speech). Other recent cases upholding injunctions restricting picketing of a doctor's residence include *Dayton Women's Health Ctr. v. Enix,* 68 *Ohio App.*3d 579, 589 *N.E.*2d 121, 124, 127 (1991), *appeal dismissed,* 62 *Ohio St.*3d 1500, 583 *N.E.*2d 971 (Ohio), *cert. denied,* ___ *U.S.* ___, 112 *S.Ct.* 3033, 120 *L.Ed.*2d 903 (1992) (the court, relying on *Frisby,* rejected a First Amendment challenge to an injunction banning picketing at or within viewing distance of the homes of patients, employees, staff or volunteers of an abortion clinic) and *Klebanoff v. McMonagle,* 380 *Pa.Super.* 545, 552 *A.*2d 677 (1988), *appeal*

denied, 522 *Pa.* 620, 563 *A.*2d 888 (1989) (the court, also relying on *Frisby*, upheld an injunction banning pro-life movement members from demonstrating outside the home of an abortion doctor). No local ordinance or state statute against focused or targeted picketing was involved in these Ohio, Texas and Pennsylvania cases.

In our view, the injunction here is content-neutral in intent, and a proper regulation because there is a significant government interest at stake, despite the 300-foot restriction on expression of a particular viewpoint. To hold otherwise would limit injunctive relief of residential picketing to circumstances of "compelling" state interest only, a higher burden not met here. Since the injunction here is content-neutral, the higher standard need not be met. Moreover, neither the United States Supreme Court, nor our Supreme Court, have ever suggested that regulation of protected speech by injunction, rather than by legislation, must be judged under a different, stricter standard. The effect here may be to disallow in this particular location, the vicinity of Dr. Murray's home, anti-abortion picketing only, but that is the effect of defendants' viewpoint, not any intent to censor on the part of the State.

As in *Frisby*, a restriction by location only, here prohibiting pickets within 300 feet of plaintiffs' home, clearly preserves ample alternative channels of communication both at the clinics where Dr. Murray performs abortions, at his office, and even generally within his own residential neighborhood or community. Finally, the ban is narrowly tailored because the problem to be remedied, intrusion into residential tranquility, is created by the

picketing itself. And it properly binds only noticed parties, their agents, and those acting in concert with them. *R.* 4:52-4.

We agree with defendants that any coercive or intimidating intent on their part can in no way limit their right to free expression. *Organization for a Better Austin v. Keefe*, 402 *U.S.* 415, 419, 91 *S.Ct.* 1575, 1577, 29 *L.Ed.*2d 1, 5 (1971). However, the coercive or intimidating effects of the picketing may be considered in tailoring restraints that fall within First Amendment limitations, because those effects constitute part of the residential intrusion, the significant governmental interest at stake.

Contrary to defendants' contention, we find that Judge Boyle did not focus on the effect of the content of the picketers' message on listeners, and therefore impermissibly on the content itself. *Boos v. Barry*, 485 *U.S.* 312, 321, 108 *S.Ct.* 1157, 1163, 99 *L.Ed.*2d 333, 344-45 (1988). In contrast, we find he focused on the intimidating effect of the bodily presence of picketers on the residents of the home.

V

Finally, defendants contend that equitable relief is precluded by plaintiffs' "unclean hands," because Dr. Murray's assault on Lawson and both plaintiffs' hostile remarks to picketers should result in forfeit of any claim to relief plaintiffs might otherwise have. Use of the unclean hands doctrine is within the court's just discretion. *Untermann v. Untermann*, 19 *N.J.* 507, 518, 117 *A.*2d 599 (1955). We review the judge's decision only for abuse of discretion, unless there was a misapplication of law.

Kavanaugh v. Quigley, 63 *N.J.Super.* 153, 158, 164 *A.*2d 179 (App.Div.1960).

The doctrine of unclean hands expresses the principle that a court should not grant equitable relief to one who is a wrongdoer with respect to the subject matter of the suit. *Faustin v. Lewis*, 85 *N.J.* 507, 511, 427 *A.*2d 1105 (1981). It calls for the exercise of just discretion in denying remedies where the suitor is guilty of bad faith, fraud or unconscionable acts in the underlying transaction. *Untermann, supra*, 19 *N.J.* at 517-18, 117 *A.*2d 599. However, the doctrine "does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct" of a complainant. *Goodwin Motor Corp. v. Mercedes-Benz of North Am., Inc.*, 172 *N.J.Super*, 263, 271, 411 *A.*2d 1144 (App.Div.1980) (quoting *Neubeck v. Neubeck*, 94 *N.J.Eq.* 167, 170, 119 *A.*26 (E. & A.1922)). The doctrine may be relaxed in the interest of fairness. *Johnson v. Johnson*, 212 *N.J.Super.* 368, 384, 515 *A.*2d 255 (Ch.Div.1986).

The bad conduct here alleged is plaintiffs' hostile behavior toward defendants during the picketing on May 4, 1991, which defendants claim demonstrated plaintiffs' desire to quell their right to free expression. Defendants argue that plaintiffs' angry remarks and Dr. Murray's assault on Lawson, for which he was convicted and fined in municipal court, should not be rewarded.

Plaintiffs do not respond specifically to this argument in their brief, but their counsel argued at trial that the April 22 fire at the Woodbridge clinic, and the May 2 bomb threat at the Howell clinic, though presumably attributable to other anti-abortionists, and not to defendants, made Dr. Murray "edgy" on May 4. Counsel also argued that the

timing of Lawson's unprecedented picketing of Dr. Murray's Plainfield office shortly after the Woodbridge fire, and the surprise of the May 4 picket after more than a two-month picketing hiatus, made plaintiffs' fear, anger, and hostile conduct understandable.

No fraud or unconscionable act is alleged. The issue is whether plaintiffs' admittedly improper self-help response to the May 4 picketers constituted a level of bad faith sufficient to preclude an equitable remedy. In our view, it did not. Defendants' argument that the bad acts demonstrate plaintiffs' malevolent intent to destroy their First Amendment rights does not resolve the question of the scope of those rights. Plaintiffs' transgressions themselves are not so egregious as to compel forfeiture of relief. Their outrage was fueled by other events which, though unrelated to these defendants, heightened the perceived threat. Also, Dr. Murray's assault was punished in the appropriate forum, municipal court.

A judge's discretionary decision not to invoke the unclean hands doctrine is justified where the conduct was "not the kind of conduct which a court must punish in order to vindicate its authority." *Schwartzman v. Schwartzman*, 248 *N.J.Super.* 73, 79-80, 590 *A.*2d 246 (App.Div.), *certif. denied*, 126 *N.J.* 341, 598 *A.*2d 897 (1991). Judge Boyle ruled that Dr. Murray's admitted "swing" at Lawson reflected the emotionally charged issues involved and that he would focus on balancing the rights of the parties, not on the misguided assault. In our view he did not abuse his discretion or misapply the law in so deciding.

Affirmed.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: UNION COUNTY
DOCKET NO. C-30-91
APP. DIV. NO. A-175-91T2

BELINDA MURRAY, et als., Plaintiff,	:	TRANSCRIPT OF PROCEEDINGS
v.	:	DECISION
MICHAEL ANDREW LAWSON, Defendant.	:	July 25, 1991

BEFORE: John M. Boyle, P.J.Ch.

ORDERED BY: RICHARD COLLIER, ESQ.

APPEARANCES:

PAMELA MANDEL, ESQ.,
Attorney for the Plaintiff.

RICHARD COLLIER, ESQ.,
Attorneys for the Defendant.

Prepared by:

COLLEEN ANNE PLATT, C.S.R.
Certificate No. XI01275

* * *

[p. 45] THE COURT: This case involves the competing interests of plaintiff's right to be free from tortious conduct and defendant's constitutional right of free speech.

Plaintiffs, Elrick A. Murray, M.D. and his wife Belinda, preside [sic] at 917 Carlton Road in Westfield, New Jersey. Their home is a one-family dwelling, set back

approximately 25 feet from the public sidewalk. It is located on a block approximately 600 yards long, 33 yards wide.

How do I know that? I looked at the tax map in Westfield.

Defendants, Michael Andrew Lawson, David Krist [sic], and other John Doe defendants, are individuals opposed to abortions who picket in front of the plaintiffs' [p. 46] home to protest Dr. Murray's performance of abortions. This court temporarily enjoined the defendant from on mass [sic] picketing before the Murray residence and limited the frequency, time, number of picketers and precluded inciting conduct.

Defendants removed the matter to the Federal District Court, to the District of New Jersey. While pending there the restraints expired. Jurisdiction was not returned and the case was remanded to this state court.

Footnote number one, before remanding the case, the Honorable Maryann Trump Barry dismissed plaintiffs' fifth count which alleged a violation of their constitutional right to privacy.

Continuing with the text of the opinion.

Upon its remand, restraints were reimposed and a plenary hearing followed.

The evidence adduced at trial – strike that.

Parenthetically I may also say, but not a footnote, that this is a final hearing by consent of all parties, therefore there will be no subsequent trial. We are talking here

about whether a permanent injunction should issue or not.

Continuing with the opinion, the evidence adduced at trial reveals that Dr. Murray performs abortions in hospitals and clinics located in Howell Township, [p. 47] Watchung, Newark and Plainfield and Woodbridge, New Jersey.

Defendants have picketed at the Howell Township clinic over a period of several years and decided to do so at Dr. Murray's home. On January 20, 1991, approximately 55 people began picketing on Carlton Road near Dr. Murray's house after advising the Westfield Police of their intention to do so.

Footnote number two. Dr. Murray testified that 6 or 7 police officers were surveying the picket. Continuing. The pickets walked single file or two abreast up and down the street past the Murray home. They carried various signs, including one which declared, "abortion is Killing," displayed photos of alleged aborted fetuses, referred to abortion as murder and used Dr. Murray's name. No instances of trespass, violence or disorderly conduct were reported.

Food [sic] note number three. On a prior occasion defendant Michael Lawson had approached Dr. Murray's home, rang his doorbell and instructed his son to, "Tell your father to stop doing abortions." He was alone, not picketing at the time.

Mrs. Murray testified that this appearance made her upset, livid and frightened.

Continuing with the opinion.

The picketing lasted approximately one hour. [p. 48] During that time Mrs. Murray left and went to her sister's home with her children aged 15, 10 and 6. Dr. Murray was home, and during that time was, among other things, watching a football game, managing a patient over the telephone and speaking on the phone.

On May 4, 1991 the picketers returned to the Murray residence, after this Court's limited injunctive order, after advising the Westfield Police, only four individuals appeared, two of whom walked in front of the residence and two of whom observed. At that time Dr. Murray allegedly struck defendant Lawson on the head from behind.

Footnote number 4. Defendant Lawson filed a municipal complaint against Dr. Murray for assault and harassment.

Continuing with the opinion.

He also attempted to remove a sign reading, "Stop abortion now," from another picketer and a neighbor, and he attempted to remove defendant Lawson's sign which read, "God says thou shalt not kill." No evidence suggests that defendants incited or aroused this action.

The Woodbridge Center was burned to the ground on April 22, 1991 and a bomb threat was received by the police concerning the Howell Township Center on May 2, 1991. No evidence exists as to who was responsible for the [p. 49] arson or the threat.

The Murrays testified that they are frightened of having picketers in their neighborhood. They assert that their presence is harasment [sic] and unnecessary and

inconvenient. Dr. Murray testified that he did not make his routine hospital visit on January 20, 1991 due to his fear. He further testified that he attends fewer medical staff meetings in order to be at home more often.

Mrs. Murray testified she is very nervous about the well-being of her children and neighbors with the presence of these picketers. She asserts that she feels violated by the picketers harassing her family in front of her home. Mrs. Murray also testified that she was very upset upon hearing a description of the picketing activity from her husband and neighbors.

Based upon this testimony, plaintiffs claim that defendants' activity is tantamount to the tort of invasion of privacy, interference with the use and enjoyment of their home, interference with Dr. Murray's profession, harassment, and infliction of emotional distress. These grounds are urged to outweigh defendants' right to picket their residence.

Defendants maintain they have a constitutionally protected right to peaceably picketing in front of Dr. Murray's home.

[p. 50] To determine whether a permanent injunction should issue, the Court must be satisfied that plaintiffs have presented a cause of action. *Ciba Geigy v. Bolar Pharmaceuticals, F.2d* 844, 850, 3d Circuit 1984, cert. denied, 471 *U.S.* 1137, 1984.

We now turn to the plaintiffs' claims. The tort of invasion of privacy involves an intrusion, "physical or otherwise, upon the solitude or seclusion of another or as private affairs or concerns – [where] the intrusion is

highly offensive to a reasonable person." *Bisbee v. John C. Conover Agency*, 186 *N.J. Super.*, 335, 339, (App. Div. 1982) (Quoting Restatement, Torts 2d, Sec. 652B at 378, (1977)).

Our equity court recognizes this right to involve a freedom "from unwarranted publicity . . . from any wrongful intrusion into [an individual's] private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *McGovern v. Van Riper*, 137 *N.J. Eq.* 24, (1945), (quoting 41 Am.Jur., Privacy, Sec. 2; 54, C.J., Privacy, Sec. 1).

There are 4 distinct invasions of privacy which include (1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life, and (4) publicity placing a person in a false light. *Id.*, (citing 3 Restatement, Torts 2d, 625A at 376, [p. 51] (1977). Liability attaches where such invasions are objectionable to a reasonable person of ordinary sensibilities. *Id.* at three 41, footnote 5.

"This tort is distinct from a constitutional right to privacy which has been interpreted to prevent governmental invasion into the "zone of privacy . . . in the penumbra emanating from the fundamental guarantees of the 1st, 4th, 5th and 9th amendments . . . [which are] made applicable to the individual states by the 14th amendment." *Mills v. Atlantic City Department of Vital Statistics*, 148 *N.J. Super.*, 302, 309, (Ch. Div. 1977), (quoting *Griswold v. Connecticut*, 381 *U.S.* 479, (1965)).

Plaintiffs – that's a plural possessive – plaintiffs' constitutional claim was dismissed for lack of governmental action in an order dated April 24, 1991 by the Federal District Court for the District of New Jersey. See

State v. Pohle, 166 *N.J. Super.* 504, 513, (App. Div. 1979), certif. denied. 81 *N.J.* 328, (1979.)

Continuing with the text of my opinion.

Plaintiff's [sic] claim for harassment and interference with use and enjoyment of the residence can be subsumed under their privacy claim. Footnote number 6.

"The claim that defendants interfered with Dr. Murray's profession is tantamount to a claim for interference with contractual relations. This requires [p. 52] proof that defendants maliciously or intentionally jepordized [sic] the contractual relation between Dr. Murray and his patients. *Sustick v. Slatina*, 48 *N.J. Super.* 134, (App. Div. 1951). Since plaintiffs produce no evidence that such interference occurred, this court will dismiss that ground for relief.

Continuing with the text of the opinion.

Thus plaintiffs [sic] actions involve the common law torts of invasion of privacy and infliction of emotional distress.

Intentional infliction of emotional distress involves proofs of "intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe." *Buckley v. Trenton Savings Fund Society*, 111, *N.J.* 355, 366, (1988).

Liability attaches where this conduct, which goes beyond the scope of decency, is intended to effect distress or with a high degree of probability result in distress. *Id.*

A claim for negligent infliction of emotional distress requires tortious conduct that results in clear and unmistakable genuine distress, *Strachan v. John F. Kennedy Memorial Hospital*, 109 *N.J.* 523, 537 (1988).

Based upon the proofs, this court is not fully satisfied that either claim has been completely [p. 53] established. Although defendants brought attention to Dr. Murray's professional life, they have not intruded into his seclusion, disclosed otherwise private information concerning Dr. Murray or depicted him in a false light, which causes me to go to footnote 7, 8 and 9.

7. This court recognizes the trespass by defendant Lawson on December 14, 1990 before this case was instituted.

8. Dr. Murray's performance of abortions is not a private fact. His profession is known to the community. He works in an area of that profession which continually comes under public scrutiny, thus Dr. Murray cannot maintain that defendants have invaded any private affairs. *Bisbee*, supra, 340.

And lastly, footnote 9, defendants' characterization of Dr. Murray as a killer or murderer constitute their beliefs regarding abortion. *Dairy Stores, Inc. v. Sentinel Publishing Co.* 104 *N.J.*, 125, 147 (1986).

Any claims that such are falsities would be properly addressed in a libel suit for damages in the Law Division.

Continuing with the text.

In addition, the defendants' conduct cannot be classified as highly offensive to a reasonable person of ordinary sensibilities.

[p. 54] *Cibenko v. Worth Publishers, Inc.*, 510, *F. Supp.*, 761 (D.N.J. 1981). Footnote 10.

It should be noted that the Court is assessing whether defendants have intruded into plaintiffs' privacy, not whether plaintiffs are disgruntled by what defendants are expressing.

The impact of speech, whether coersive [sic] or unsettling, does not remove it from the First Amendment protection. See Officials [sic] for a Better Austin v. Keefe, 402 U.S. 415, 419, (1971). However, it could be classified as harassing.

Subsection 11, which reads, Dr. Murray testified that one of defendants' signs declared that they would get out of Westfield as soon as Dr. Murray got out of Howell. This message does not disemanate [sic] information or ideas, but aims to harass the plaintiff.

Continuing with the text of the opinion.

As to plaintiffs' emotional distress claim, no evidence suggests that Dr. or Mrs. Murray suffered measureable [sic] harm. Such a claim must be substantiated through medical testimony to avoid the Court engaging in conjecture or speculation as to the effect of defendants' conduct upon plaintiffs.

Portee v. Jaffee, 84 *N.J.* 88, 93, (1980).

Here only plaintiffs testified to their [p. 55] concern, inconvenience and displeasure at having the picketers present.

This court might say parenthetically as well that the Court fully appreciates the fact that some people are

more frightened than others. Some people's perception [sic] are different than others.

Continuing with the text of this opinion.

In addition to these claims, this court must also consider equitable principles when determining the appropriateness of injunctive relief. Ciba Geigy, supra, at 850.

Plaintiffs have a privacy interest irrespective of their potential tort claim. That interest involves, "preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." *Carey*, supra, at 47.

It can operate to limit First Amendment rights, even where the intrusion is not tresspatory [sic] or otherwise obstructed. *Frisby v. Schultz*, 487 *U.S.* 474, 486, (1988).

The Court of equity has the inherent authority to balance that interest against First Amendment rights. *Sears Roebuck and Co.*, supra.

In other words, this court does not accept [p. 56] defendants' position that no injunction can issue unless a crime or an expressed tort has been committed. These constitutional rights previously referred to in this opinion will now be addressed.

Peaceful picketing is a constitutionally protected method of expression. *Thornhill v. Alabama*, 310 *U.S.* 88, 106, (1940).

The right to use traditional public fora for communication of ideas is protected so long as "in consentientes

(phonetic) with peace and good order." *Hague v. Commission for Industrial Organization*, 307 *U.S.* 4496, 515 and 516, (1939).

A traditional public forum includes streets which run through residential neighborhoods. *Frisby v. Schultz*, 487 *U.S.* 474, 480, 1988.

Picketing is not, however, a pure form of speech and enjoys limited First Amendment protection. *Cox v. Louisiana*, 379 *U.S.* 536. 563, 1965.

It can be regulated through time, place and manner restrictions which are content neutral, narrowly tailored to serve a significant government interest and leave open ample alternative methods of communication. *Perry Education Association v. Perry Local Educational Association*, 460 *U.S.* 37, 45 (1983). Footnote 12.

Where regulations designating time period for [p. 57] pickets have been upheld, banning picketing from one area completely have not. *Community for Creative Non-Violence v. Turner*, 893 *F.2d* 1397, 1393, (D.C. Cir. 1990); *Clark v. Community For Creative Non-Violence*, 468 *U.S.* 295, 298. And footnote number 8 (1984); *Rock v. Racism*, 491, *U.S.* 78, 791, (1989).

Continuing with the text of the opinion.

Residential picketing has been upheld in the face of governmental regulations on First Amendment grounds.

Where citizens march peacefully from city hall to a mayor's residence in protestation of a segregated public school system, the Supreme Court upheld the picketers' First Amendment rights, even though onlookers

numerous and unruly [sic]. *Gregory v. Chicago*, 394 *U.S.* 111, 112, (1969).

Similarly, a civil rights organization's peaceful picket before a mayor's residence in support of a racial integration bussing policy was protected on First Amendment grounds. *Carey v. Brown* 447 *U.S.* 9455 [sic], 459 through 462, (1980).

In addition, pro life demonstrators were permitted to walk peaceably though a neighborhood of a doctor who performed abortions. *Frisby*, supra.

While the Supreme Court recognized the [p. 58] residents' private interest, this was not elevated above the picketers' first amendment rights, rather that interest served as a basis for limiting the picketers' activity.

The circuit and district courts have also upheld picketers' rights challenged on privacy grounds. The second circuit allowed a group opposed to the Russian treatment of Jews to picket outside the Russian Mission in a residential area so long as peaceable. See *Concerned Jewish Youth v. McGuire*, 471 *F.2d* 473 (1973) certif. denied, 1980.

The Seventh Circuit allowed 13 members of the Committee Against Racism to picket in front of the Chicago mayor's home in protestation of a school bussing policy. *Brown v. Scott*, 602, *F.2d.* 791, 792, Seventh Circuit, (1979).

In addition, the Eastern District of Pennsylvania's District Court allowed a pro life group to "enter any neighborhood alone or in groups to march and peaceably spread their beliefs on the public ways" so long as no intimidation tactics were used. *Northeast Women's Center,*

Inc. v. McMonagle, 745 *F.Supp.* 108, 1092-94, (E.D. Pa. 1990).

On the state level, a Maryland Appellate court allowed a group known as "The Community Action for Non-Violence" to picket in front of the Secretary of [p. 59] Defense's home to protest the proliferation of nuclear armaments of the United States Government. *State v. Schuller*, 372 *A.2d* 1076, 1077, (Ct. App. Md. 1977).

The Court dinstinguished [sic] permissible communication from impermissible conduct which includes noisy, boisterous and threatening speech, as well as marching and trampling picketers whose conduct "lends itself to regulation by narrowly drawn statutes aimed at the specific dangers involved." *Id.* at 1081.

In the absence of a challenged state regulation, a Texas Court of Appeals dissolved a temporary injunction that prohibited picketing within one half mile radius of a residence based upon the picketers' colorable First Amendment rights. *Valenzuela v. Aquino*, 763 *S.W.2d* 43, 45 (Tex. App-Corpus Christi 1988).

Upon hearing the merits, the trial court issued a permanent injunction against picketing within 400 feet of that residence. *Valenzuela v. Aquino*, 800 *S.W.2d* 301, 303 (Tex. App-Corpus Christi 1990).

In reviewing the propriety of that injunction the Court initially recognized its right to enjoin "by way of regulation, constitutionally protected speech when necessary to further a significant governmental interest." *Id.* at 305, (quoting *Picken v. Okolona Mun. Separate School District*, 549 *F.2d* 433, 437 (5th Cir. 1979).

[p. 60] It then upheld that limited injunction based upon its content-neutrality, narrow scope and allowance for alternative avenues of expression. *Id.* at 305-306 at 304. The Court stated "while in *Frisby*, the validity of an ordinance restricting picketing was in issue, we are here concerned with the propriety of an injunction prohibiting picketing within a certain distance of the residence of the appellees.

Although the constitutionality of an ordinance prohibiting express activity could be considered more questionable than an injunction directed at specific persons and places after a hearing, we find that the *Frisby* analysis is appropriate in the scrutiny of the constitutionality of the permanent injunction. See *United States v. Gedaratirs*, 690 *F.2d*, 351, 356, (Third Cir. 1982), certif denied, 9460, *U.S.* 1970, 103 Sup. Ct. 1527, 75 L. Ed. 2d 1949, 1983, (injunction restricting picketing is permissible where narrowly tailored to serve important governmental interests), (citing the citation to *Valenzuela* in 763 *S.W.2d*, 43, at 44, 45, (Tex App-Corpus Christi, 1990) . . . " and there are other cases similarly cited which I will not bother with, but merely refer to for reference.

Also at page 305 the court stated, "appellants argue that there is no state interest in joining their [p. 61] expressive activity because silent picketing does not 'actually intrude' upon appellee's residential privacy.

We disagree. It is not necessary for there to be trespass or disturbance for one to impose. The clear and unrestrained language the targeted residential picketing "inherently and offensively intrudes upon residential privacy." *Frisby*, 108, *Sup. Ct.* at 2503.

This Court recognizes that an intrusion into residential privacy does not require a trespass, rather even peaceable picketing can intrude on residential privacy it it's targeted at a particular home. *Frisby,* supra, at 486.

Based upon these numerous case holdings it is clear that first amendment protection of defendants' picketing must be tailored in accordance with the plaintiff's privacy interests. The former cannot be paramount in all instances. This would defy its limited First Amendment protection. See *Cox,* supra. The latter cannot prevent expression completely.

In light of its authority to fashion an equitable remedy, this court will enjoin the defendants from picketing within 300 feet of the plaintiffs' residence. They may move through the neighborhood, but they cannot come within 300 feet of the Murray's [sic] home.

In addition, and it goes without saying, the [p. 62] defendants must act peaceably and refrain from trespassory or obstructive conduct.

This court takes judicial notice of Westfield Town Code, Sec. 24-25.1 which concerns loitering or obstructing traffic, use of loud or profane language.

In order that it be crystal clear, in referring to the tax map of the town of Westfield, which is page 1764, and referring to that map, I note that Dr. Murray's house is on block 643 on lot 12, that he faces on Carlton Road, a distance which I have previously indicated. That street is bounded by the intersection on the west by Grove Street, on the east by Clifton Street. On the remaining block in the back to the north is Central Avenue, which I take

cognizance of the fact it is a rather busy street that runs at least from Clark Township through and into Westfield, New Jersey until ultimately reaching its central business district. Central Avenue is both residential in character and in parts commercial in character, but I'm not making any finding as to whether this area is on central Avenue, however, I'm satisfied based upon the pictures which are in evidence, based upon the testimony and the undisputed fact that Carlton Road itself is a completely residential street on both sides, so is Grove Street, so is Clifton Street. To the south is a street entitled The Boulevard. This is a street that is [p. 63] truly a Boulevard. It's 100 feet wide, but it's nevertheless a residential street, the whole area, with possible parts of Central Avenue completely residential, and so that might be characterized, "the neighborhood," although I'm not limiting the neighborhood to those streets. I'm just trying to give anyone reading this opinion a rough idea of what the immediate neighborhood is like.

Consequently, to make my opinion clear, absent any further legislative response from the Town of Westfield, this court will not restrict the peaceable picketing any further than what I have indicated. Such restrictions are consistent with the First Amendment protection afforded to defendants without intruding upon plaintiff's privacy. Footnote 13.

The constitutional right of free speech and expression does not require a court to be insensitive towards citizens' interests in comfort and convenience. See *Kovacs v. Cooper,* 336 *U.S.* 77, (1949).

Consistent with the spirit, as well as the intent within that zone, 300 feet in any direction from Dr. Murray's home, there shall be no vehicles or signs displaying any signs or activity that would be reasonably interpreted to be picketing either by vehicle as opposed to pedestrian. They are free to parade through the rest of [p. 64] the neighborhood.

Westfield has not saw [sic] fit, as Millburn apparently did, to pass any kind of ordinance. It's a free country. If they want to picket through the residential areas of Westfield, they are free to do so. Consistent with this it is so ordered. Off the record.

(There is a discussion off the record.)

MR. COLLIER: Judge, is the temporary restraining order –

THE COURT: Oh, let's go back on the record. The temporary restraining order is dissolved and there is a permanent injunction consistent with my opinion.

MS. MANDEL: Now, I would like it to be in effect so there is no interim time where there is no order in effect.

THE COURT: Well, there is an order in effect as of this instant, because I said so.

MS. MANDEL: All right. But in terms of enforcing it I need to have a document. If I can get it to your office tomorrow morning?

THE COURT: Absolutely.

MS. MANDEL: And I know that one of the defendants is in court, so could we assume that Mr. Lawson has actual notice of this order?

THE COURT: I see – I take notice that Mr. [p. 65] Lawson is sitting in the second seat.

Right, Mr. Lawson?

MR. LAWSON: Yes.

THE COURT: There he is, mustache, glasses and all. I can spot him any [sic] anywhere.

All right. Thank you.

MS. MANDEL: Thank you.

MR. COLLIER: Thank you, Judge.

(Conclusion of proceedings.)

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Attorney for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-UNION COUNTY
Docket No: VNN-C-30-91

BELINDA MURRAY & ELRICK A. MURRAY, M.D.,	:	Civil Action
v.	:	FINAL ORDER FOR PERMANENT INJUNCTION
MICHAEL ANDREW LAWSON, DAVID CRIST, JANE DOE (a fictitious name) & JOHN DOE (a fictitious name),	:	(Filed Jul. 26, 1991)
Defendants.	:	

THIS MATTER being opened to the Court by Pamela Mandel, Esq., attorney for the plaintiff, and Richard F. Collier, Jr., Esq., appearing on behalf of the defendants, and the Court having considered the testimony of the parties, the evidence and legal argument of counsel, and for good cause shown;

IT IS ON THIS 26th day of July, 1991

ORDERED that the defendants and all persons in active concert or participation with them be enjoined and restrained from picketing in any form including parking, parading or demonstrating in any manner, within 300 feet of the Murray residence at 917 Carleton Road, Westfield, New Jersey, and it is further

ORDERED that all prior Orders in this matter shall be dissolved; and it is further

ORDERED that with the consent of the parties, this Final Order for Permanent Injunction shall be considered a final decree in this action.

/s/ John M. Boyle
JOHN M. BOYLE, J.S.C.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BELINDA MURRAY and ELRICK A. MURRAY, M.D., Plaintiffs, VS. MICHAEL ANDREW LAWSON, DAVID CRIST, JANE DOE (a fictitious name) and JOHN DOE (a fictitious name), Defendants.	Civil Action No. 91-824(MTB) OPINION (Filed Apr. 24, 1991)

BARRY, District Judge,

I. INTRODUCTION

Present before the Court is the motion of defendants Michael Andrew Lawson, et al., ("defendants"), to dissolve an order entered by the Superior Court of New Jersey, Chancery Division, Union County, prescribing certain guidelines under which defendants and their associates would have to conduct themselves in carrying out large rallies protesting the practice of abortion. The state court entered its order in response to a complaint for injunctive relief filed by plaintiffs, Belinda and Elrick A. Murray ("plaintiffs"), in whose neighborhood and before whose home the protestors gathered. Plaintiff Elrick A. Murray is a physician licensed to practice medicine in

this State, and is currently affiliated with a medical clinic which provides abortion services. The state court entered its restraining order on Friday, February 22, 1991, four days prior to defendants' removal of this case to this Court, on Tuesday, February 26, 1991.

Defendants contend that the order of the state court was a temporary restraining order and that, of necessity, it expired no later than ten days after the date of removal, that is, on March 12, 1991. In the alternative, defendants argue that, in any event, the restraints are unconstitutional under the First Amendment of the Constitution of the United States, and must be dissolved.

Plaintiffs, by contrast, assert that the relief entered by the state court was in the nature of a preliminary injunction and that the terms of the order thus remain in full force and effect. Moreover, plaintiffs contend that the order of the state court is in complete conformity with the provisions of the Constitution and that there is thus no impediment to leaving the terms of the order in place. Plaintiffs have not, however, made a formal motion to reinstate the terms of the order in the event that the Court determines that it was in fact temporary in nature and, therefore, of no force or effect after March 12, 1991.

For the reasons set forth below, it is my conclusion that the order entered by the state court was temporary and that the order therefore lapsed as a matter of law ten days after removal, *i.e.*, March 12, 1991. Accordingly, there being no order left to dissolve, the Court will deny as moot defendants' motion to discharge the restraints, defendants having been relieved from the restrictions placed upon them by the state court.

II. FACTS AND PROCEDURAL BACKGROUND

Plaintiffs, husband and wife, are citizens of the State of New Jersey, currently residing with their three children at 917 Carlton Road, in Westfield. *See* Complaint at Preamble. Plaintiffs' home is situated in a residential neighborhood comprised of single family dwellings.

As indicated, plaintiff Elrick A. Murray is a physician specializing in obstetrical and gynecological care. In this capacity, plaintiff currently serves as Medical Director at the Medical Care Center in Woodbridge, New Jersey, and the Women's Medical Center in Howell, New Jersey. *Id.* at ¶ 1. Both of these centers provide abortion services. *Id.*

Defendants are individuals who are opposed to abortion. Defendants have appeared intermittently over the last two years at the Women's Medical Center, in Howell, to protest abortion. *Id.* at ¶ 2; *see also* Answer at ¶ 2.

Beginning in approximately December, 1990, defendants, or people acting in concert with them, began to focus some of their protest activities within plaintiffs' neighborhood. On or about December 14, 1990, defendant Michael Andrew Lawson crossed over plaintiffs' front lawn, rang the door bell, and told plaintiffs' fifteen year old that his father should stop performing abortions. *See* Complaint at ¶ 3; *see also* Certification of Michael A. Lawson (hereinafter "Lawson Cert."), dated February 13, 1991, at ¶ 6. On January 20, 1991, approximately 56 protesters marched in front of plaintiffs' home, "praying and singing spiritual songs". *See* Lawson Cert. at ¶ 4. Many people in the group carried signs reading: "Stop Abortion Now"; "Dr. Murray scars women and kills their

unborn children"; "Legalized abortion is legalized murder"; "Stop the killers". *Id.* at ¶ 5.

On or about February 6, 1991, plaintiffs filed a verified complaint in the Superior Court seeking damages and injunctive relief against defendants. The substantive counts of the complaint were as follows:

> *First Count:* As to defendant Michael Andrew Lawson, trespass;
>
> *Second Count:* As to all defendants, disruption of the use and enjoyment of property;
>
> *Third Count:* As to all defendants, intrusion upon plaintiffs' seclusion;
>
> *Fourth Count:* As to all defendants, damage to plaintiff Elrick A. Murray's professional reputation and pecuniary interests;
>
> *Fifth Count:* As to all defendants, deprivation of plaintiffs' right to privacy "as contained in [a] number of the rights granted by the Constitution of the United States and the New Jersey Constitution".

See Complaint at pp. 1-6. As indicated, in addition to seeking damages, plaintiffs also sought an injunction: 1) prohibiting defendant Michael Andrew Lawson "from trespassing or otherwise visiting the Murray residence . . . or [from] speaking with or approaching any of the Murray children", *see* Complaint at First Count, ¶ 4(B); and 2) prohibiting all defendants "and all persons and organizations associated with or acting and working in concert or combination with them from further activities on Carlton Road or within 300 feet of Carlton Road", *see* Complaint at Second Count, ¶ 4(B).

On February 8, 1991, the Hon. John M. Boyle, J.S.C., heard oral argument on plaintiffs' request for immediate injunctive relief. While the parties now apparently labor under some confusion as to the form of relief ultimately granted, it is clear from the transcript of proceedings that Judge Boyle dealt with the application strictly as an order to show cause with temporary restraints and, indeed, the order he subsequently entered – which was subject to modification or dissolution upon five days notice to either party – reflects this. Thus, at the hearing, Judge Boyle specifically stated, "Now, remember, this is only a temporary restraining order". *See* Transcript of Proceedings in the Superior Court, February 8, 1991 (hereinafter "Tr. I") at p. 19; *see also* Tr. I at p. 26. Indeed, although Judge Boyle did hear counsel for both sides before entering the relief requested – a fact upon which plaintiffs' counsel places great weight in attempting to argue that she secured a preliminary injunction rather than a temporary restraining order –Judge Boyle indicated that this was strictly for the purpose of hearing legal argument, and not for the purpose of taking testimony prior to the entry of preliminary relief. Thus, Judge Boyle stated: "We normally don't hold a hearing at this stage [counsellor], but in light of the importance of the case, even though we're not taking any testimony, I elected to do it in open court so that we have a full record in the event of an appeal". *See* Tr. I at p. 20. Finally, on the second and last day of argument, which took place after an adjournment of several days during which the protestors agreed to temporarily halt their activities, Judge Boyle stated to defendants' attorney just after announcing his decision from the bench: "This is only temporary". *See* Transcript

of Proceedings in the Superior Court, February 14, 1991 (hereinafter "Tr. II") at p. 68.

After announcing his decision, Judge Boyle directed plaintiffs' counsel to submit an order reflecting the relief granted. Plaintiffs' counsel did so and, on February 22, 1991, Judge Boyle signed the order after making only minor changes in some of the wording. The order, which was entitled "Temporary Restraining Order" read as follows:

> This matter being opened to the Court by Pamela Mandel, Esq., attorney for the plaintiffs, and Richard Traynor, Esq., appearing on behalf of defendants, Michael Andrew Lawson and David Crist, and the parties having submitted Affidavits and other evidence and having appeared and argued before the Court on Friday, February 8 and Thursday, February 14, 1991, and for good cause shown,
>
> IT IS on this 22nd day of February, 1991
>
> ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from using the word killer or murderer or from referring to Dr. Murray and members of his family by name. This restriction applies to both the spoken and the written word; and it is further
>
> ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from engaging or carrying signs that contain language which is offensive or could be considered harassment to the plaintiffs or is inciteful; and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from making any loud noises in the Murray neighborhood, trespassing or obstructing the ingress or egress of the plaintiffs or their neighbors; and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from coming on to or damaging the property of the Murray residence at 917 Carlton Road, Westfield, NJ on any pretense and for any reason; and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from approaching or communicating with the children of the plaintiffs at any time or any place; and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from picketing before or about the residence of the plaintiffs at 917 Carlton Road, Westfield, NJ except as follows:

1. Defendants may picket for not more than one (1) hour every third week commencing the week of February 18, 1991. There is to be no picketing until that time;

2. That no more than two (2) demonstrators may be present at the plaintiffs' residence until further Order of the Court.

3. Should any additional demonstrators be present in the adjacent area to the plaintiffs'

residence, they may not congregate near the plaintiffs' house but must walk through-out the entire neighborhood to include at least the distance to Central Avenue;

4. The sign which was present on January 20, 1991 of the decapitated person which purported to be a fetus is prohibited; and it is further

ORDERED that the defendants and all persons and organizations associated with or acting in concert or combinations with them be enjoined and restrained from hand delivering written material to the plaintiffs or their neighbors; and it is further

ORDERED that the defendants, Michael Andrew Lawson and David Crist shall disseminate a copy of this Order to all known and unidentified confederates, demonstrators or pickers [sic] who may be present at or near the plaintiffs' residence; and it is further

ORDERED that a copy of this Order shall be provided to the Westfield Police Department by defendants and the Westfield Police Department is authorized to enforce the terms of this Order; and it is further

ORDERED that both parties have the right to move for a dissolution or a modification of the restraints hereby imposed on five (5) days notice to either party.

s/ John M. Boyle, J.S.C.

See Notice of Removal at Exh. J.

As indicated, defendants timely removed plaintiffs' complaint to this Court on February 26, 1991. Counsel for

defendants thereafter made a request of this Court to dissolve the temporary restraints, subsequently withdrew the request, later renewed it, and, just prior to the date on which this Court was to hear the application, attempted to pursue an appeal to the United States Court of Appeals for the Third Circuit.[1] The Court of Appeals summarily remanded the case to this Court in order to provide the Court with an opportunity to determine whether or not the state court order was in force. In remanding, the Court of Appeals also suggested that this Court determine whether there is federal jurisdiction in this case under the "well pleaded complaint" rule. *See generally Gully v. First Nat. Bank*, 299 U.S. 109, 113 (1936) (Cardozo, J.) (well pleaded complaint rule).

For the reasons set forth below, I conclude that this Court has jurisdiction over this removed case, and that, as indicated, the order of the state court lapsed ten days after removal, *i.e.*, March 12, 1991.

III. DISCUSSION

III(a). Jurisdiction

In their notice of removal, defendants properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1331 by asserting that the face of plaintiffs' complaint set forth a cause of action under the Constitution of the United States which, in fact, it does. *See*

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[1] The Court has previously set forth the procedural history surrounding the request by defendants' counsel for relief from the order, and will not reiterate all of the details here. *See Murray v. Lawson*, No. 91-824(MTB) (D.N.J. March 26, 1991) at p. 1, n. 1.

Complaint, Fifth Count (deprivation of plaintiffs' right to privacy "as contained in [a] number of the rights granted by the Constitution of the United States. . . . "); *see also* Notice of Removal at ¶ 5.

While it is manifestly obvious that plaintiffs' allegations with respect to their constitutional claims are hopelessly misplaced – there is no state action which would sustain these claims – it is also clear that the absence of state action is a issue relating to the merits of the underlying claim, not the jurisdictional sufficiency of the complaint. *See Boyle v. The Governor's Veterans Outreach and Assistance Center*, No. 90-3352, slip op. at pp. 5-6 (3rd Cir., January 31, 1991) (Rosenn, J.). As the Court of Appeals noted in an analogous context:

> [Plaintiff's] complaint asserted jurisdiction under 28 U.S.C. § 1331's general grant of federal question jurisdiction and under 28 U.S.C. § 1343(3) & (4)'s grant of civil rights jurisdiction. As we reasoned in *Kulick v. Pocono Downs Racing Association*, 816 F.2d 895 (3d Cir. 1987), once the plaintiff has alleged that the defendant's actions violated requisite federal law, the truth of the facts alleged in the complaint, as well as their legal sufficiency in establishing a section 1983 action, citing *Duke Power Co. v. Carolina Environmental Study Group. Inc.*, 438 U.S. 59, 70-71 (1978); *Bell v. Hood*, 327 U.S. 678, 682 (1946), is a question on the merits.
>
> * * *
>
> Accordingly, where the motion to dismiss is based on the lack of state action, dismissal is proper only pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim and not under Rule

12(b)(1) for lack of jurisdiction. *Pocono Downs*, 816 F.2d at 897-98.

See Boyle, slip. op. at p. 6 (additional citations omitted). Accordingly, while it is clear that this portion of plaintiffs' complaint must be dismissed for failure to state a claim upon which relief may be granted, a matter to which I will turn, *infra*, it is also clear that, as a threshold matter, the complaint states a federal question and was therefore removable.

III(b). Status of the Temporary Restraining Order After Removal

After removal, the order of the state court remained in full force and effect. 28 U.S.C. § 1450 specifically provides:

> Whenever any action is removed from a State court to a district court of the United States. . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

See 28 U.S.C. § 1450. Section 1450 was enacted to promote judicial economy by avoiding the necessity of duplicative applications for injunctive relief, and to ensure that the status quo is not disturbed by the fortuity of a shift in jurisdiction. *See Granny Goose Foods, Inc. v. Brotherhood of Team, Etc.*, 415 U.S. 423, 435-436 (1974).

When a case in which a temporary restraining order has been issued by a state court is removed, however, that order remains in force "no longer than it would have remained in effect under state law, [and] in no event does

the order remain in force longer than the time limitations imposed by [Federal Rule of Civil Procedure] 65(b), measured from the date of removal." *See Granny Goose*, 415 U.S. at 439-440.

Pursuant to Federal Rule of Civil Procedure 65(b), a temporary restraining order lasts no more than ten days, absent an extension for a like period of time for good cause shown or a continuation by consent. *See* Fed.R.Civ.P. 65(b). Pursuant to the Rules Governing the Courts of the State of New Jersey, Rule 4:52-1, a temporary restraining order may last no more than twenty days after the date of its issuance in the case of a resident defendant, absent an extension for a like period of time or a continuation by consent. *See* R. 4:52-1.

This case was removed to this Court on February 26, 1991. Ten days from the date of removal, calculated in conformity with Federal Rule of Civil Procedure 6(a)[2], was March 12, 1991, the last possible day on which the

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[2] Rule 6(a) provides, in pertinent part: "In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less then [sic] 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." No legal holidays occurred during the period in question.

order could have remained in effect pursuant to Federal Rule of Civil Procedure 65(b). *See Granny Goose*, 415 U.S. at 439-440. Accordingly, the order expired on that date.

III(c). Failure To State A Claim

Finally, as stated earlier, the only possible basis for the assertion of this Court's federal question jurisdiction given that diversity between the parties does not exist is found in that part of the Fifth Count of plaintiffs' complaint which alleges a deprivation of their right to privacy "as contained in [a] number of the rights granted by the Constitution of the United States. . . . " Also, as noted earlier, plaintiffs' claims as hereinbefore described fail to state a claim upon which relief may be granted, there being no state action, *see, e.g., Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 721-722 (1961); *see also Civil Rights Cases*, 109 U.S. 3, 11 (1883). Accordingly, that part of the Fifth Count which alleges infringement of plaintiffs' rights under the Constitution of the United States will be dismissed.[3] It follows inexorably that the pendent state

[3] A federal district court may *sua sponte* dismiss a complaint or a portion thereof where it appears that the claimant cannot possibly prevail. *See Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3rd Cir. 1980) ("Nevertheless, for a court to grant judgment on the pleadings, *sua sponte*, is not error. The district court may on its own initiative enter an order dismissing the action provided that the complaint affords a sufficient basis for the court's action." (citation omitted)). *Accord, Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (trial court may dismiss a claim *sua sponte* without notice "where the claimant cannot possibly win relief"); *Baker v. United States Parole Com'n.*, 916 F.2d 725, 726 (D.C.Cir. 1990) (*sua sponte* dismissal "is

claims, which comprise the remainder of the complaint, will be remanded to the Superior Court, Chancery Division, Union County, from whence they came.[4]

IV. CONCLUSION

For the reasons set forth above, defendants' motion to dissolve the temporary restraining order entered by the Superior Court, Chancery Division, Union County, on

practical and fully consistent with plaintiffs' rights and the efficient use of judicial resources").

[4] Whether or not pendent state claims should be remanded to state court after all of the bases for federal jurisdiction drop out is a question of judicial discretion and not one of subject matter jurisdiction. *See Rosado v. Wyman*, 397 U.S. 397, 403-405 (1970); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In this circuit, the practice of retaining pendent state claims is disfavored. *See Lovell Mfg. v. Export-Import Bank of The U.S.*, 843 F.2d 725, 735 (3rd Cir. 1988) ("Absent 'extraordinary circumstances,' a district court in this circuit is powerless to hear claims lacking an independent jurisdictional basis, and 'time already invested in litigating the state cause of action is an insufficient reason to sustain the exercise of pendent jurisdiction' " (*quoting Weaver v. Marine Bank*, 683 F.2d 744, 746 (3rd Cir. 1982)). Accordingly, the remaining state claims will be remanded to the state court. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) (district courts have discretion to keep, remand or dismiss a case removed from the state court when all federal claims have dropped out of the action and only pendent claims remain).

February 22, 1991, will be denied as moot, and this case will be remanded. An appropriate order will issue.

/s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

Dated: April 24, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5192

BELINDA MURRAY, ET AL

v.

MICHAEL ANDREW LAWSON, ET AL,

Appellants

(Newark, NJ D.C. Civ. No. 91-00824)

ORDER

PRESENT: BECKER, GREENBERG, and COWEN, *Circuit Judges.*

The motion of appellants for a stay of temporary restraining order pending appeal is DENIED. The motion to dismiss appeal is reserved. This case is hereby summarily remanded to the district court, so that the district court may determine whether any temporary restraint or interlocutory injunction remains in effect pursuant to New Jersey Rule 4:52-1 or the Federal Rules of Civil Procedure, and also whether there is any federal jurisdiction in this case under the "well-pleaded complaint" rule. This court will retain jurisdiction meanwhile, assuming that the district court will hear and determine the matter promptly. In the event that the district court concludes that there is no federal jurisdiction, it may enter an order

remanding the case to the state court. However, any such order shall be subject to review by a party aggrieved by filing a praecipe to reactivate appeal with the Clerk of this court. If the district court enters an order of remand but no such motion to reactivate is filed, the Clerk of this court shall mark the appeal dismissed without costs to either party.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: APR 5 1991
EMP/cc: RFC
PM
Hon. Barry

RECEIVED AND FILED
order
4-5-91✓EMP
SALLY MRVOS
Clerk

No. 94-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL LAWSON and DAVID CRIST,

Petitioners,

—v.—

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On Sunday, January 20, 1991, Petitioner Lawson and approximately 56 other demonstrators picketed in front of the suburban residence of Respondents, Dr. Elrick Murray and his wife Belinda Murray, in Westfield, New Jersey, to protest Dr. Murray's performance of abortions. Dr. Murray neither maintains an office nor performs abortions at his home. Petitioners' Appendix (PA) at 67a.

Dr. Murray did not, as Petitioners describe, spend a relaxing Sunday at home. He, in fact, remained at home on the advice of the Westfield police and, also on their advice, sent his wife and children, ages 6, 11 and 15, to stay with relatives. Fearful of leaving the house, he was forced to manage patients in labor over the telephone. Subsequent to the picketing, Mrs. Murray became anxious and depressed; Dr. Murray curtailed many of his professional obligations for fear of leaving his home unattended. PA at 68a.

Respondents filed suit seeking a temporary restraining order and a permanent injunction. A temporary restraining order was entered by the Superior Court of New Jersey, Chancery Division, on February 22, 1991, permitting picketing for one hour every third week by no more than two demonstrators.[1] On July 26, 1991, the court issued a permanent injunction prohibiting Petitioners from coming within 300 feet of the Murray residence.

Both the New Jersey Superior Court, Appellate Division, and the Supreme Court of New Jersey affirmed the permanent injunction. After this Court decided the case of *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), Petitioners petitioned this Court for certiorari. This Court

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[1] Evidentiary hearings were held on February 14, 1991 for the temporary restraining order and on May 21 and 31, and July 25, 1991 for the permanent injunction. PA at 67a.

granted the petition, vacated the judgment below, and remanded for further consideration in light of *Madsen*. *Lawson v. Murray*, 115 S. Ct. 44 (1994).

On remand, the New Jersey Supreme Court reconsidered its decision in light of the new standard announced in *Madsen* for the constitutionality of content-neutral injunctions: whether they burden "no more speech than necessary to serve a significant government interest." 114 S. Ct. at 2525. The court concluded that the 300 foot zone did burden more speech than necessary to serve the significant government interest in protecting residential privacy, and revised the injunction in light of the new standard.

In determining the boundaries of appropriate injunctive relief, the New Jersey Supreme Court relied on the trial court's well-developed record, which included a videotape of the demonstrations, photographs, personal examination by the trial judge of the Murrays' street and neighborhood, the tax map of the town of Westfield and testimony of witnesses. PA at 26a-30a.

The court first determined that, based on this record, some form of bright line, no-picketing buffer zone was necessary to protect the Murrays' privacy. The court noted that although the original picket line spanned a route of approximately ten houses, at no time was the Murray home free from picketers. Injunctive relief was necessary, therefore, to protect the Murrays from being "under siege" in their residence. The court viewed a "bright line" no-picketing zone, as compared to Petitioners' and amici's suggestion of a long line of marchers large distances apart, as preferable from the standpoint of police enforcement. PA at 33a-34a.

The court then considered the trial court's factual findings concerning the physical layout of the Murrays' neighborhood and the homes on their block. It noted that the 300 foot buffer zone placed the demonstrators out of sight of the Murrays, even from their yard, making it difficult for the

demonstrators to communicate their message. It therefore narrowed the buffer zone to 100 feet from the boundary of the Murray property, a mere lot and a half away. Under this arrangement, the Murrays' residential privacy is protected because they can not hear or see the demonstrators from inside their house, but the demonstrators' speech is made more effective because the Murrays can see the demonstrators from their yard, if they choose to leave the house and receive the message. PA at 35a-36a. The Murrays are therefore given a zone of refuge, but that zone is no wider than necessary to protect their privacy.

The New Jersey Supreme Court further limited the number of pickets to ten, so that the Murrays will not feel "under siege" but the picketers will not be so few as to appear to represent only a marginal viewpoint. It limited picketing to one hour every two weeks so that Petitioners can demonstrate often enough and long enough to get their message across without subjecting the Murrays to a constant barrage of picketing.[2] Finally, the injunction requires Petitioners to notify the Westfield police twenty-four hours in advance of any picketing. *Id.*

Objecting to even these modest restrictions, Petitioners once again seek review of the New Jersey Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, the New Jersey Supreme Court's decision does not conflict with decisions of lower federal courts or of this Court. The decision below faithfully applies this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 to facts set forth in a

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[2]Petitioners apparently do not object to the limits on frequency and duration of picketing.

comprehensive record developed by the trial court. It carefully adjusted the free speech rights of Petitioners, and the state's and Respondents' interests in residential privacy, so as to "burden no more speech than necessary" to protect those interests. The writ, therefore, should be denied.

I. THE DECISION OF THE NEW JERSEY SUPREME COURT DOES NOT CONFLICT WITH A DECISION OF THE SIXTH CIRCUIT.

Petitioners claim that the decision of the New Jersey Supreme Court and of the Court of Appeals for the Sixth Circuit in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995) are in "glaring conflict." Petitioners' Brief (Pet. Brf.) at 8. This is not the case.

In *Vittitow*, anti-abortion picketers filed suit claiming a town ordinance that prohibited picketing "before or about" any residence was unconstitutional. The trial court issued an injunction that attempted to narrow the scope of the ordinance to the area in front of a targeted residence or "the two homes on either side" of the targeted residence. The Sixth Circuit stated that the narrowing injunction was unconstitutional because it created a no-picketing zone beyond the area "solely in front of a particular residence." 43 F.3d at 1105 (citing *Madsen*, 114 S. Ct. at 2530). Petitioners claim this holding conflicts with the decision of the New Jersey Supreme Court creating a no-picketing buffer zone of 100 feet on either side of the Murrays' residence.

The *Vittitow* injunction, however, interprets a statute of general applicability, unlike the injunction in this case, which adjusts the rights of private parties based on the facts of an individual case. As the Sixth Circuit said,

> This is not a case where the target of the picketing has come to court seeking an injunction. In such a case, the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for. Here, however, an ordinance was at issue.

43 F.3d at 1107. An injunction interpreting an ordinance to place demonstrators two houses away from their target throughout an entire town will have varying effects on speech depending on the neighborhood where the picketing is taking place. Such an injunction may well therefore burden more speech than necessary to serve the interests of residential privacy. It is such a "one-size-fits-all" injunction that the Sixth Circuit held to be beyond the scope of this Court's decisions in *Frisby v. Schultz*, 487 U. S. 474 (1988), and in *Madsen*. *Vittitow*, 43 F.3d at 1107.

In contrast, in this case "the target of the picketing has come to court seeking an injunction" and the court has "define[d] the rights of the parties in an appropriately worded injunction." 43 F.3d at 1107. That injunction, pursuant to the dictates of *Madsen*, has been crafted to burden no more speech than necessary, in light of the facts of the case, to serve the state's interest in residential privacy.[3]

The decisions of the Sixth Circuit in *Vittitow* and of the New Jersey Supreme Court in this case are not in conflict.

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[3] If *Vittitow* does interpret *Madsen* to forbid no-picketing zones larger than the frontage of a residence when private parties seek relief in a particular case, *Vittitow* is wrong. This Court in *Madsen* struck an injunction providing a 300 foot no-picketing zone because it was "much larger" than the zone provided for in the ordinance approved in *Frisby* and it appeared that a smaller zone could have accomplished the desired result. 114 S. Ct. at 2530. *Madsen* did not establish how large the smaller zone should be, leaving that task to trial judges to determine, based on the facts of the individual case, keeping in mind the new standard that the injunction should burden no more speech than necessary to serve the state's significant interests.

II. PEACEFUL PICKETING IN RESIDENTIAL NEIGHBORHOODS MAY BE SUBJECTED TO TIME, PLACE AND MANNER RESTRICTIONS THAT BURDEN NO MORE SPEECH THAN NECESSARY TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

Petitioners argue that peaceful picketing cannot be regulated by an injunction without some accompanying wrongful conduct. Although Petitioners state that such injunctions "fl[y] in the face of long-settled constitutional doctrine," Pet. Brf. at 10, they do not cite a single case for this proposition. On the contrary, this proposition flies in the face of this Court's decisions in *Madsen* and *Frisby*.

In *Frisby* this Court held that peaceful picketing may not be banned, but may be subject to time, place and manner restrictions that are narrowly tailored to serve significant government interests. In that case this Court upheld an ordinance that banned picketing "before or about" a single residence.

Petitioners here do not challenge the authority of *Frisby* and point to no reason why a state court sitting in equity[4] may not impose constitutional time, place and manner restrictions on similar picketing when a private party applies for relief. The only relevant constitutional question is whether Petitioners' speech has been burdened more than necessary to achieve a significant state interest. *Madsen*, 114 S. Ct. at 2525.

Indeed, *Madsen* approved the issuance of an injunction without any finding of prior unlawful conduct. In that case, this Court reviewed an injunction that banned residential picketing

[4]Whether the New Jersey courts of equity have authority to issue such injunctions in the absence of a statute is a matter of state law. Petitioners acknowledge as much. Pet. Brf. at 9 n.4.

within 300 feet of the residences of staff of a Florida health center that provided abortions. While this Court struck the ban as burdening more speech than necessary to achieve the government's significant interest in residential privacy, the Court counseled that "it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." 114 S. Ct at 2530. This Court did not require that in order for the injunction to be valid, the demonstrators must have done something illegal, and the trial court in *Madsen* did not find that, as to the residential picketing, any such unlawful acts had occurred.

Requiring some unlawful conduct to justify an injunction makes no sense in light of this Court's recognition in *Frisby* that targeted residential picketing "*inherently and offensively* intrudes on residential privacy." 487 U.S. at 486 (emphasis added). Petitioners are correct that their peaceful picketing is not "wrongful" and that it is protected by the First Amendment. They ignore the fact, however, that it does intrude on other important governmental and private interests and is therefore subject to regulation, consistent with constitutional standards.

III. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT A PRIOR RESTRAINT.

Petitioners argue that the injunction at issue here is unconstitutional as a "prior restraint." This Court's decision in *Madsen*, however, categorically rejected this argument.

In reviewing the propriety of an injunction creating a 36-foot no-picketing "buffer zone" around a Florida abortion clinic, this Court said the injunction was not a prior restraint for two reasons, both of which apply here. First, unlike valid time, place and manner regulations, prior restraints absolutely ban a message in advance of publication. In contrast, the "petitioners [in *Madsen*] are not prevented from expressing their message in any one of several different ways; they are simply prohibited

from expressing it within the 36-foot buffer zone." *Madsen*, 114 S. Ct. at 2524 n.2. Similarly, here Petitioners are simply prohibited from expressing their message within the 100 foot no-picketing zone that surrounds Respondents' residence. Outside that zone, they are free to display any message they please. Moreover, under the terms of the New Jersey court's modified injunction, that message is in full sight of all who care to view it, even the Murrays, should they step outside their home.

Second, this Court said in *Madsen* that "the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct." *Id.* The same analysis applies here. The New Jersey Chancery Court issued the injunction, not to quash Respondents' message, but to prevent a method of expression that this Court has acknowledged "inherently and offensively" intrudes on residential privacy. *Frisby*, 487 U.S. at 486.

Petitioners misconstrue this last statement from *Madsen* to mean that a finding of prior unlawful conduct is a precondition to a finding that an injunction aimed at picketing is not a prior restraint. The New Jersey Supreme Court correctly rejected this argument. PA at 21a. The correct constitutional inquiry, as stated in *Madsen*, is whether the restraint can be justified other than by reference to the content of the message. Nothing in *Madsen* or any other case suggests that prevention of unlawful conduct is the only non-content-based rationale that takes an injunction out of the category of prior restraints. Indeed, in *Madsen* this Court did not find the trial court's injunction a prior restraint, despite the fact that no crime or tort had been committed by the demonstrators in relation to that activity.[5]

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[5]Petitioners say that this Court has found prior restraints when an injunction did not restrict content. Prior restraints, however, may restrict content or they may restrict a class of speech *because of* its content. That is so in two of the cases petitioners cite. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (striking injunction that banned all leafletting because the leaflets contained material critical of a realtor who engaged in racially discriminatory practices); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (finding a prior restraint in an injunction that banned all rallies of white separatist group because of content of speech at previous rallies). In a third case, the Court struck a statute that authorized injunctions based directly on the content of publications. *Near v. Minnesota*, 283 U.S. 697 (1931) (striking statute authorizing injunctions of malicious, scandalous or libelous publications). As stated above, the injunction here neither bans a message nor is imposed because of the message conveyed.

Petitioners further state that the requirement that they notify the police twenty-four hours in advance of a demonstration violates the First Amendment. This argument ignores this Court's holdings that even requirements for parade permits are permissible when the official's decisions on whether to grant or deny the permit are based on "narrow and definite" criteria that do not allow discriminatory administration because the official disagrees with the content of the speech. *Cox v. New Hampshire*, 312 U.S. 569 (1941). Such a permit system "giv[es] . . . public authorities notice in advance so as to afford opportunity for proper policing." *Id.* at 576. Here, of course, only notice is required; the police have no authority to prevent Petitioners from picketing.[6]

Petitioners also complain that limiting the number of picketers to ten is arbitrary and in violation of the First Amendment. On the contrary, the New Jersey Supreme Court was careful to allow Petitioners a strong enough showing, consistent with the residential nature of the neighborhood and the Murrays' privacy, that their message would not seem marginalized. Petitioners have pointed to no authority for the proposition that limiting pickets to ten in a specific, suburban residential setting is excessively restrictive. In contrast, all the cases cited by Petitioners involve statutes or ordinances of general applicability to a wide geographic area. *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 558-61 (5th

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[6]Ironically, Petitioners have voluntarily notified the police prior to their demonstrations even before the New Jersey Supreme Court's ruling. PA at 90a-91a.

Cir. 1988)(striking as unconstitutionally overbroad Texas statute prohibiting picketing by more than two persons 50 feet apart); *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) (striking ordinance that allowed only two pickets at a time at any location in a city); *Davis v. Village of Newburgh Heights*, 642 F. Supp. 413, 415 (N.D. Ohio 1986) (ordinance limiting pickets to no more than six at any location in a city is unconstitutional. "[N]umber of pickets should be decided on a case-by-case basis.")

The doctrine of prior restraints is inapplicable here.

IV. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT CONTENT-BASED.

Petitioners argue that the New Jersey Supreme Court erred in not applying the strict standards applicable to a "content-based" restriction on speech in a public forum. This Court rejected this argument in *Madsen* as well.

The fact that an injunction covers only people with a certain viewpoint does not render it content- or viewpoint-based. *Madsen*, 114 S. Ct. at 2524. As with prior restraints, the principal inquiry in determining content neutrality is whether the governmental regulation is adopted "without reference to the content of the regulated speech." *Id.* at 2523 (citing *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)). In *Madsen*, the injunctive order was adopted without reference to content because it was adopted to cure abuses of a previous order aimed at protecting access to an abortion clinic. Only those with an anti-abortion view were covered by the injunction because only persons with those views had engaged in those demonstrations. Similarly, here the injunctions were entered to protect residential privacy, not to silence Petitioners' speech. Only Petitioners were covered because they were the only picketers. PA 21a.

Petitioners claim the injunctions are nevertheless

constitutionally suspect as content-based because they are justified by the intimidating effect of the picketing on the Murrays. While it is true that "intimidating effects" of the content of speech may not justify injunctive relief, intimidating effects of a form of speech may justify valid time, place and manner regulations to alleviate those effects. This Court in *Frisby* recognized that the intimidating effect of focused residential picketing may constitutionally justify a regulation of that activity and contrasted such permissible regulations to those based on the intimidating effect of the content of speech.

> [A]s opposed to regulations of communications due to the ideas expressed, which 'strikes at the core of First Amendment values,' regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment.

487 U.S. at 487, quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 83-84 (1983) (Stevens, J., concurring in the judgment). Compare cases cited by Petitioners, *Boos v. Barry*, 485 U.S. 312 (1988) (ordinance that banned speech "critical of foreign governments" cannot be justified with reference to the intimidating effect of such speech on foreign diplomats); *Madsen*, 114 S. Ct. at 2529 (holding that ban on display of "images observable" inside clinic cannot be justified by disagreeable nature of images).

The injunction at issue here is therefore not content-based.

V. THE COURT BELOW DID NOT BASE THE INJUNCTION AT ISSUE HERE ON VAGUE OR INDEFINITE STANDARDS.

Petitioners argue that because the court[7] below said an injunction can be based on the "intimidating effect" of residential picketing, it allowed restrictions on speech to be based on an "inherently subjective" standard. Pet. Brf. at 23. This argument again completely ignores this Court's decisions in *Frisby* and *Madsen*. *Frisby* recognized focussed residential picketing as inherently offensive and intimidating. *Madsen* affirmed this conclusion. 114 S.Ct. at 2529-30. Hence, when focussed residential picketing takes place, it may be regulated in a manner that burdens no more speech than necessary to serve the government interest in abating these effects. The intimidating "effect" of such activity is settled and, therefore, not open to subjective interpretation.

VI. COURTS MAY CREATE REASONABLE "PICKET-FREE" ZONES IN RESIDENTIAL NEIGHBORHOODS.

Petitioners argue that the courts may not create picket-free zones in residential neighborhoods. This argument is plainly contradicted by this Court's holding in *Madsen*. In that case this Court ruled that while the record before it did not justify a 300 foot picket-free zone around the homes of staff members of a Florida health clinic, "it appear[ed] that a limitation on the time, duration of picketing, and number of pickets *outside a smaller zone* could have accomplished the desired result." *Madsen*, 114 S. Ct. at 2530 (emphasis added). This Court plainly contemplates small picket-free zones as permissible means of serving the state interest in residential privacy. The New Jersey Supreme Court did not err in creating such a zone.

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[7]Petitioners refer to the decisions of the Appellate Division and the New Jersey Supreme Court in this portion of their argument. (Pet. Brf. Point IV.B.) The only relevant decision here is that of the New Jersey Supreme Court.

Additionally, Petitioners argue that even if such a zone is permissible, it is limited to the frontage of the targeted property because "Respondents' privacy interests are limited to the borders of their own property." Pet. Brf. at 28. Nothing in *Frisby* or *Madsen* supports the proposition that privacy interests coincide with property lines. The privacy interest is in not being held captive inside one's own home by a lurking presence outside the door. *Frisby*, 487 U.S. at 484-87. Depending on the facts of the individual case, that intimidating effect can be felt if demonstrators are next door, as well as if they are directly in front of the door. This is the case on the Murrays' street where the width of the residential lots is modest.[8] The New Jersey Supreme Court specifically found that the 100 foot buffer zone was necessary to allow the Murrays to isolate themselves from the demonstrators while they are inside the house. *See also City of San Jose v. Superior Court of Santa Clara County*, 38 Cal.Rptr.2d 205, 212 (Ca. Ct. App., Sixth District 1995) (post-*Madsen* case approving legislative judgment that "[p]icketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy for its occupants and instill identical feelings of captivity, fear and intimidation . . . as do picketers directly in front of the residence").

Petitioners also argue that Respondents' privacy interests "are not a valid excuse for restricting their neighbors' access to the marketplace of ideas." Pet. Brf. at 28. This is a gross exaggeration of the effect of the injunction. Respondents may parade in plain sight of every resident of the Murrays' block;[9] their ideas are accessible to all. The injunction's only effect is to allow the Murrays to retreat inside their home in order not to see them and not to feel like "prisoners within their own home." PA at 35a.

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[8]The lots on the Murrays' block are 65 to 70 feet wide. PA at 28a.

[9]The block is 1800 feet long. PA at 30a. Counting the frontage of the Murray property and the 100 feet on either side, Petitioners are barred from picketing on at most 270 feet of that length.

CONCLUSION

The New Jersey Supreme Court faithfully applied this Court's precedents to craft an injunction that burdens no more speech than necessary to serve the state's significant interest in protecting residential privacy. The petition for certiorari should be denied.

Dated: April 3, 1995

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SUPREME COURT OF THE UNITED STATES

MICHAEL LAWSON AND DAVID CRIST *v.* ELRICK MURRAY AND BELINDA MURRAY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 94–1450. Decided May 30, 1995

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, concurring.

Last Term's decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. ___ (1994), has damaged the First Amendment more quickly and more severely than I feared. In this case the New Jersey courts asserted the power to enjoin residential picketing by antiabortion demonstrators that was explicitly found to have been peaceful and in violation of no state statute or rule of common law. It is one thing for the courts to enforce by injunction a general, content-neutral state law (civil or criminal) against all residential picketing, or to enjoin particular individuals from continuing residential picketing that they have conducted in an unlawful manner (*e.g.*, with the accompaniment of violence). It is quite another thing for the courts to enjoin particular individuals from conducting lawful residential picketing that they have conducted in a lawful manner in the past. That is an unconstitutional prior restraint.

Respondents are Elrick Murray, an obstetrician-gynecologist who performs abortions, and his wife. The two petitioners planned a demonstration at respondents' residence on Sunday, January 20, 1991. On the appointed day, they and 56 other picketers met two policemen near respondents' house; received instruction from the policemen in basic picketing protocol; and were escorted to the sidewalk running in front of respondents'

house and 10 neighboring houses. The protestors, carrying signs, walked in a single-file loop on the sidewalk past respondents' house; the picketing lasted about an hour, and "[n]o instances of trespass, violence or disorderly conduct were reported." App. to Pet. for Cert. 90a (App.).

In February 1991, respondents filed suit against petitioners and others in state court, seeking damages and injunctive relief for various common-law torts: invasion of privacy (including interference with the use and enjoyment of respondents' residence), intentional infliction of emotional distress, interference with contractual relations, and others. The Chancery Division of the trial court entered a temporary restraining order. After a hearing on the merits, the trial court denied respondents damages on the ground that *respondents had not made out any of their tort claims*. See *id.*, at 92a–97a. The court then went on to make the following rulings, which converted the proceeding from a tort suit for damages and injunctive relief into a proceeding for imposition of a judicial prior restraint:

> "In addition to these claims, this court must also consider equitable principles when determining the appropriateness of injunctive relief.
>
> "Plaintiffs have a privacy interest *irrespective of their potential tort claim*. . . .
>
> "It can operate to limit First Amendment rights, *even where the intrusion is not tresspatory* [sic] *or otherwise obstructed*.
>
> "The Court of equity has the inherent authority to balance that interest against First Amendment rights.
>
> "In other words, *this court does not accept defendants' position that no injunction can issue unless a crime or an expressed tort has been committed.*" *Id.*, at 97a (emphases added; citations omitted).

The court then "balanced" the equities and, on the strength of *Frisby* v. *Schultz*, 487 U. S. 474 (1988), found that respondents' interests in residential privacy justified an injunction restraining "defendants and all persons in active concert or participation with them . . . from picketing in any form . . . within 300 feet" of respondents' home. App. 106a.

The Appellate Division and the New Jersey Supreme Court affirmed. When petitioners sought certiorari we granted their petition, vacated the judgment, and remanded for reconsideration in light of our decision in *Madsen*. See *Lawson* v. *Murray*, 512 U. S. ___ (1994). On remand, the New Jersey Supreme Court affirmed the trial court's injunction in part and modified it in part. The court acknowledged (as it had stated even more clearly in its first opinion) that the injunction was "not imposed to remedy unlawful conduct," 138 N.J. 206, 225, 649 A.2d 1253, 1263 (1994), but rejected petitioners' claim that the injunction therefore constituted an invalid prior restraint. In the alternative, the court relied on an asserted "captive audience" exception to the prior restraint doctrine. See *id.*, at 226, 649 A.2d, at 1263.

Although I dissented in *Madsen*, I do not believe that the opinion for the Court in that case "approve[d] issuance of an injunction against speech . . . *even when there has been found no violation, or threatened violation, of a law.*" 512 U. S., at ___ (SCALIA, J., dissenting) (emphasis in original) (slip op., at 22). To the contrary, the Court did obeisance to the venerable principle that "[i]njunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree," *id.*, at ___ (slip op., at 8) (citing *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953)), no matter how little that principle was honored in application. See also 512 U. S., at ___ (slip op., at 9) ("[I]njunctions . . . afford more precise relief than a statute where a violation of the law has already occurred"); *id.*, at ___, n. 3 (slip op., at 9, n. 3) ("Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a cogniza-

ble danger of recurrent violation") (internal quotation marks omitted).

The Federal Constitution does not, of course, directly require that an injunction issue only in such circumstances. But where injunctions *that prohibit speech* are concerned, the Free Speech and Free Press Clauses of the First Amendment impose that requirement indirectly. All speech-restricting injunctions are prior restraints in the literal sense of "'administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur'" (emphasis omitted). *Alexander* v. *United States*, 509 U. S. ___, ___ (1993) (slip op, at 5). Precedent shows that a speech-restricting "injunction" that is not issued as a *remedy* for an adjudicated or impending violation of law is also a prior restraint in the condemnatory sense, that is, a prior restraint of the sort prohibited by the First Amendment.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), the state courts enjoined the petitioner from distributing literature or picketing anywhere within the city limits, on the same ground that the New Jersey courts expressed here: "the public policy of the [State] strongly favored protection of the privacy of home and family" from the speech activities. Cf. 138 N.J., at 224, 649 A.2d, at 1263 ("the injunction was entered pursuant to the [trial] court's authority to grant equitable relief to enforce a valid public policy of this State" protecting residential privacy). We held the injunction to be an unconstitutional prior restraint, reasoning that "the injunction operates, *not to redress alleged private wrongs*, but to suppress [speech] on the basis of previous publications." 402 U. S., at 418–419 (emphasis added). *Keefe* relied on *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), the foundation case in this area, where we struck down a state-court order that enjoined a newspaper from publishing malicious, scandalous or defamatory material. We found the order to be an unconstitutional prior restraint, observing that the

statute which authorized the order "is not aimed at the redress of individual or private wrongs," *id.*, at 709, and that "the object of the statute is not punishment, . . . but suppression," *id.*, at 711. See also *id.*, at 715; *Hirsh* v. *Atlanta*, 495 U. S. 927 (1990) (STEVENS, J., concurring in denial of stay) (distinguishing injunctive relief against "a class of persons who have persistently and repeatedly engaged in unlawful conduct" from "a naked prior restraint against . . . a group that did not have a similar history of illegal conduct").

The very episode before us illustrates the reasons for this distinction between remedial injunctions and unconstitutional prior restraints. The danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views is obvious enough even when they are based on a completed or impending violation of law. Once such a basis has been found, later speech may be quashed, or not quashed, in the discretion of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction; the injunction is enforceable through civil contempt, a summary process without the constitutional protection of a jury trial; and the only defense available to the enjoined party is factual compliance with the injunction, *not* unconstitutionality, see *In re Felmeister*, 95 N.J. 431, 445, 471 A.2d 775, 782 (1984); *In re Carton*, 48 N.J. 9, 16, 222 A.2d 92, 96 (1966). But the threat to the First Amendment becomes positively alarming when violation of the law is not even a necessary prelude to this expansive discretion—when the defendant's prior speech (and proposed future speech) has been expressly found *not* to constitute a crime or common-law tort, and the only basis for the injunction is a nebulous "public policy" of the State enforced by an inherent equitable power. See 138 N.J., at 225, 649 A.2d, at 1263. This is *by definition* a policy of enjoining in advance speech that the State does not punish after the fact—that is to say, a policy narrowly tailored to nothing but the suppression of lawful speech. And even

that damning assessment assumes, of course, that such a "public policy" even exists in state law, which is highly questionable here. The New Jersey courts have given equitable relief against residential picketing not violative of state law only in this case and another recent case involving abortion protestors. See *Boffard* v. *Barnes*, 136 N.J. 32, 642 A.2d 338 (1994).* The temptation in cases involving issues of social controversy—precisely the cases where the First Amendment's protections are most needed—will always be for judges to discern a "policy" against whatever-speech-looks-bad-at-the-moment.

Even our *Madsen* decision was, as I read it, unwilling to invite such consequences by cutting prior-restraint doctrine loose from the requirement that injunctions be remedial. The prior-restraint argument advanced by petitioners in that case was summarily rejected in a footnote with the observation that

> "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints' . . . . Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . zone [covered by the injunction]. Moreover, the injunction was issued not because of the content of petitioners' expression, . . . *but because of their prior unlawful conduct.*" *Madsen*, 512 U. S., at ___, n. 2 (emphasis added) (slip op. at 8, n. 2).

The New Jersey Supreme Court read this footnote to mean that even an injunction *not* imposed to remedy or prevent unlawful conduct may nonetheless be valid, depending on an assessment of "factors" such as content-

*In *K-T Marine, Inc.* v. *Dockbuilders Local Union 1456*, 251 N.J. Super. 107, 597 A.2d 540 (1991), the Appellate Division affirmed an injunction against residential picketing by a union. There, however, the injunction issued because the trial judge found that "tortious activity . . . had taken place and would continue unless the court interceded." *Id.*, at 110, 597 A.2d, at 542.

neutrality and availability of alternative channels of communication. See 138 N.J., at 221–226, 649 A.2d, at 1261–1263. But such factors determine the validity of *subsequent* restraints, see, *e.g.*, *Simon & Schuster, Inc.* v. *Member of New York State Crime Victims Bd.*, 502 U. S. 105, 116 (1991); *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), and to make them conclusive of the validity of prior restraints as well would destroy the doctrine that prior restraints are specially disfavored, see *Patterson* v. *Colorado ex rel. Attorney General of Colorado*, 205 U. S. 454, 462 (1907) (Holmes, J.); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 598 (1976) (Brennan, J., concurring in judgment). The presence of such validating factors is a necessary *and sufficient* condition for the constitutionality of a subsequent punishment, but merely a necessary condition for the constitutionality of a prior restraint, which requires *in addition* that it be remedial. It is improper to attribute a different meaning to the ambiguous *Madsen* footnote, which after all appeared in an opinion that elsewhere purported to honor the requirement that speech-restricting injunctions be remedial.

The principal ground for the decision below, then, does not apply *Madsen* but expands it, and contracts the First Amendment *pari passu*. I think it of vital importance that *Madsen* quickly be limited to what it said, rather than what it did. I nonetheless do not vote to grant certiorari here, for two reasons: The alternative ground for the court's decision (existence of a "captive audience" exception to the doctrine of prior restraint), while a highly questionable basis for a discretionary injunction power, presents no clear conflict with the decisions of other courts and could prevent us from reaching the *Madsen* issue. And clarification of *Madsen* is in any event unlikely to occur in another case involving the currently disfavored class of antiabortion protesters. Accordingly, I concur in the denial of certiorari.